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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1792

BOARD OF TRUSTEES OF
KEENE STATE COLLEGE, ET AL.,
PETITIONERS,

v.

CHRISTINE M. SWEENEY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on January 4, 1978, petition for rehearing denied on March 20, 1978.

Opinions Below

The opinion of the District Court for the District of New Hampshire is not officially reported, but it is unofficially reported at 14 FEP Cases 1220 and appears in Appendix B. The opinion of the Court of Appeals is officially reported at 569 F.2d 169 and appears in Appendix A.[1]

Jurisdiction

The judgment of the Court of Appeals affirming the trial court's judgment was entered on Jan. 4, 1978; Petition for Rehearing was denied on March 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

Pursuant to Title VII of the Civil Rights Act of 1964, as amended:

1. Whether a court may substitute its judgment of a female professor's qualifications for promotion for that of the duly elected faculty review committee charged with this responsibility:

- where the court found the promotion review system satisfied plaintiff's rights of due process and equal protection
- where there was no showing that the faculty review committee's actions were sexually premised
- where the court drew an inference of discriminatory practice from absolute numbers and incidents unrelated to the peer review process
- where the plaintiff *had been promoted* so that the effect of the court's order was merely to backdate this promotion one year.

2. In light of this Court's decision in *Hazelwood*,[2] does the scarcity of women in the higher faculty ranks, without reference to any relevant labor pool, support an inference of a pattern and practice of discrimination in *promotion*?

3. Does a court's finding of a pattern of discrimination generally in hiring, promotion, and salary impose on

[1] References to pages in the appendices appear as "(A-), (B-)", etc.

[2] *Hazelwood School District et al.* v. *United States*, ___ U.S. ___, ___, 97 S.Ct. 2736 (1977), 53 L.Ed.2d 768 (1977)

the defendants in an individual disparate treatment case a more arduous burden than that stated by this Court in *McDonnell Douglas* "to articulate some legitimate, nondiscriminatory reason"[3] for their actions?

Statute Involved

The federal statute involved here is Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, as amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. Pertinent statutory provisions are set forth in Appendix C.

Statement of the Case

This is an employment discrimination action in which the plaintiff's major allegations are that she was denied promotion from associate to full professor on two occasions because of her sex and that she has been paid less than male faculty members with similar qualifications and responsibilities.

The judgments by the courts below rest on errors in evaluating the probative force to which the evidence was entitled and reflect an intermingling of legal models from individual and "pattern or practice" cases in such a fashion as to deprive defendants of their legitimate defenses. The effect of this decision on the future application of Title VII in colleges and universities and the precedent for an expanded judicial presence in the academic community are explored under "Reasons for Granting the Writ". Below follow the legal proceedings and facts pertinent to this exploration.

The action was brought in the federal District Court under Title VII of the Civil Rights Act of 1964, as amended;

[3] *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). *Cf., International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 52 L.Ed. 396 (1977)

the Equal Pay Act of 1963, 29 U.S.C. §206(d), as amended by the Education Amendments of 1972, 29 U.S.C. §213(a); Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 *et seq.*; and 42 U.S.C. §1983 and the Fourteenth Amendment to the United States Constitution. (B-1) Plaintiff named as defendants Keene State College, its Board of Trustees, its president and two former deans. (B-2)

On April 13, 1977 the District Court ruled as a matter of law that neither the Equal Pay Act of 1963 nor Title IX of the Education Amendments of 1972 was applicable to the plaintiff's action. Further, the court found no violation of her rights under 42 U.S.C. §1983 and the Fourteenth Amendment. (B-1, 2) As to Title VII, the court noted its jurisdiction "pursuant to 42 U.S.C. §2000e-5(f)(1)(A)" and set forth the *McDonnell Douglas* "shifting burden" model as its intended test of the evidence.[4]

> "In order to prevail, the plaintiff must establish a *prima facie* case of discrimination. Once that is done the burden shifts to the defendants to show a non-discriminatory motive. The burden then shifts back to the plaintiff to show that the rebuttal is pretextual." *McDonnell Douglas,* 411 U.S., at 804. Opinion, B-2.

The trial court did not specifically state whether the action was a case of disparate treatment, whether the plaintiff was obligated to prove intent, or how in fact she established her prima facie case. The court found, however, that "[t]he evidence establishe[d] a pattern of sex discrimination at Keene State College with regard to hiring, promotion and salary" (Finding #2, B-25) which, the

[4] The misapplication of this test is discussed in part III, *infra*, at pp. 15-19.

court held, defendants did not rebut. (Finding #10, B-25) The court concluded that the plaintiff—who by 1976 had received the desired promotion to full professor on her third application—would have been promoted on her second attempt had she been a male candidate. (Finding #5, B-25) The court held that the defendants "*ha[d] not proven that they had a non-discriminatory motive* in failing to promote her in the academic year 1974-75". (Finding #8, B-25; emphasis supplied) Accordingly, it ordered plaintiff's promotion to be backdated one year to July 1, 1975 with the appropriate pay adjustment and awarded her "reasonable attorneys' fees and costs". (B-26) The court found no persuasive evidence that the plaintiff had been discriminated against with respect to her salary. (Finding #12, 13, B-26)

Petitioners filed a motion asking the District Court to amend and supplement its findings, conclusions and judgment. The motion directed the court's attention to specific evidence which demonstrated that the peer review committee in 1974-75 treated women more favorably than men. The committee that year considered the cases for promotion and/or tenure of six women and twenty-five men. The plaintiff was the *only* unsuccessful female candidate. Thirteen male applicants were unsuccessful. Moreover, an appellate-level faculty committee chaired by a woman professor investigated the plaintiff's case and found no evidence to support her charge of sex discrimination. On May 4, 1977 the District Court denied the motion. Petitioners then filed their notice of appeal to the United States Court of Appeals for the First Circuit. The plaintiff filed a notice of cross appeal from the portions of the judgment adverse to her claims, particularly seeking reversal of the trial court's holding that she failed to prove sex discrimination in her pay. (A-3)

On appeal Petitioners argued that plaintiff had failed to prove intent to discriminate against her on the basis of sex as required in a disparate treatment case. Petitioners stated that plaintiff's evidence failed to prove her individual promotion case in light of the procedures for evaluation, review and recommendation followed at the college, and that the trial court had erred, under these circumstances, in substituting its judgment of plaintiff's qualifications for that of the faculty review committee.

These review procedures and the criteria for promotion, which are set forth in the college faculty manual(s), have never been in dispute. Some form of this peer review system is followed at virtually all colleges and universities. The key agents in its operation are the faculty committees whose members are elected each year by the faculty and to whom the Board of Trustees has delegated the responsibility of reviewing applicants for promotion (and tenure). Absent extraordinary circumstances, peer approval is a prerequisite to promotion.

In the established procedure at Keene State College, the Faculty Evaluation Advisory Committee initially evaluates candidates and makes recommendations to the dean. On two occasions, different committees each year recommended unanimously (5-0) against plaintiff's promotion to full professor. The Faculty Appeals Committee reviews appeals from negative decisions, and twice reviewed appeals from the plaintiff. This committee looks for arbitrary, capricious or prejudicial actions, or for some new evidence of merit to warrant reversal of the promotion denial. The president and the two deans named as defendants in this case were not members of any faculty review committee. Although the dean and the president have authority to reverse the Faculty Evaluation Advisory Committee's

recommendation, they almost invariably follow it,[5] and the defendants did so in plaintiff's case each time. (A-6, 7) Significantly, the trial court found that plaintiff had suffered no deprivation of her §1983 and Fourteenth Amendment rights under this system. (B-2)

In addition, Petitioners challenged on appeal the competency of plaintiff's statistical and incidental evidence. The trial court had considered absolute numbers of men and women in each rank without reference to the relevant labor pool, to the small size of the sample, or to historical factors, including the fact that Title VII only became applicable to the college in 1972. (B-22 through B-23) Petitioners emphasized on appeal that the significance of these numbers diminished, or disappeared, when comparisons were made between the number of women in each department and the number of women available in the applicable labor market.[6] Specifically, with respect to promotion, Petitioners showed that women were promoted as frequently as men at all levels, including full professor, when the number of eligible women on the faculty was considered.

On January 4, 1978 the Court of Appeals affirmed the District Court's judgment. In its opinion the court enunciated as the rule of law for this case that

> "disparate treatment cases, such as this one, differ from disparate impact cases . . . [and] proof of discriminatory motive is critical in a disparate treatment case." Opinion, at A-9, 10, citing *McDonnell Douglas*, 411 U.S. 792, 802-806, and *Teamsters*, 431 U.S. 324, 335-336, n.15.

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[5] In only two unique cases cited by defendants (one involving a female applicant and the other involving a male dean returning to teaching) were negative decisions by the Faculty Evaluation Advisory Committee overridden by the dean or president.

[6] These figures were taken from the availability/utilization study in the college's affirmative action plan, which was a trial exhibit.

Petitioners contended in their petition for rehearing that whereas the court recognized this principle, it focused the critical test on the wrong agents of the college; and moreover, like the District Court before it, erroneously required them to prove absence of discriminatory motive (A-15; B-25, Finding #8) for not promoting plaintiff in 1975, despite the peer committee's recommendation against promotion. The petition for rehearing was denied on March 20, 1978.

Reasons for Granting the Writ

I. This Court Should Grant Certiorari To Determine the Scope of Judicial Review Under Title VII in Academic Employment Cases.

Colleges and universities, where questions of faculty promotion are delegated to a peer review committee system, are surely unique among those employment settings covered by Title VII. Charges of sex discrimination there call for discerning analysis and application of the law which this Court has not yet undertaken.

The judgment below in this case is a radical departure from the tradition of judicial restraint in the academic community. The Court of Appeals concedes this, citing decisions in other academic cases: *Keyes* v. *Lenoir Rhyne College,* 552 F.2d 579 (4th Cir. 1977), *cert. denied,* 46 U.S.L.W. 3258 (U.S. Oct. 18, 1977); *Faro* v. *New York University,* 502 F.2d 1229 (2d Cir. 1974); *Green* v. *Board of Regents of Texas Tech University,* 474 F.2d 594 (5th Cir. 1973) (suit under §1983); and *Johnson* v. *University of Pittsburgh,* 435 F.Supp. 1328 (W.D.Pa. Aug. 1, 1977) [dissolving preliminary injunction issued in 359 F.Supp. 1002 (W.D. Pa. 1973)], among others. (A-11, 12)

The Fifth Circuit in *Green, supra,* stated that:

> "The findings and decisions of academic administrative bodies are to be upheld by the courts when reached by correct procedures and supported by substantial evidence." 474 F.2d, at 595.

The Second Circuit in *Faro, supra,* expressed its strong concern about judicial intervention in these terms:

> "Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision. . . . Such a procedure, in effect, would require a faculty committee charged with recommending or withholding advancements or tenure appointments to subject itself to a court inquiry at the behest of unsuccessful and disgruntled candidates as to why the unsuccessful was not as well qualified as the successful." 502 F.2d, at 1231-1232.

Furthermore, the judgment in the case at bar disregards the caution this Court has exercised regarding judicial intrusion into academic and administrative decisionmaking. This Court has declined to interpose its judgment without compelling circumstances involving fundamental constitutional rights. *See,* e.g., *Wood* v. *Strickland,* 420 U.S. 308, 326 (1975); *Bishop* v. *Wood,* 426 U.S. 341, 349-50 (1976). *Cf., Epperson* v. *Arkansas,* 393 U.S. 97, 104 (1968); *Goss* v. *Lopez,* 419 U.S. 565, 578 (1975).

Recently, in considering a dismissed medical student's due process claims under the Fourteenth Amendment, this Court held that:

> "Even assuming that the courts can review under such a standard [of arbitrariness] an academic decision of

a public educational institution, we agree with the District Court that no showing of arbitrariness or capriciousness has been made in this case. [Footnote omitted.] Courts are particularly ill-equipped to evaluate academic performance." *Board of Curators of the University of Missouri et al.* v. *Charlotte Horowitz*, 46 U.S.L.W. 4179, 4183 (U.S. March 1, 1978).

Petitioners urge that the federal courts are likewise ill-equipped to pass on academic credentials for promotion[7] and should exercise equivalent restraint under Title VII. The courts should not substitute their judgment *unless* plaintiffs demonstrate that the peer review system has deprived them of their Fourteenth Amendment rights, or that the motivation proscribed by Title VII underlies the

[7] In the case at bar, the courts below disclaim they took on the role of evaluating plaintiff's academic credentials. The Court of Appeals stated that the very fact plaintiff was ultimately promoted demonstrates that she was qualified for promotion. The record, according to the court, "does not reveal any significant change in her credentials from 1973 to 1976, *although she did become more active in Keene's reading program*", and therefore, "the district court was not required to serve as [a super-evaluation committee] in passing upon her qualifications." (A-16, n. 18; emphasis supplied).

These statements, however, fail to distinguish between "qualifications" as used in the industrial employment context of *McDonnell Douglas*, and "qualifications" as applied to a candidate for promotion to full professor, the highest academic rank in the college. Where maturity, service and peer recognition are key considerations in promotion, the fact that plaintiff was promoted in 1976 with the recommendation of her colleagues does *not* establish that she was entitled to promotion without her peers' recommendation in any earlier year(s). The court's brushing aside of her increased involvement in the college's reading program illustrates the process of judicial substitution of judgment to which Petitioners strongly object.

Curiously, there was no distinction between plaintiff's record in 1972-73 (when the trial court found promotion was properly denied) and in 1974-75 (when the trial court held promotion should have been granted) except that in 1974-75 she did not have the recommendation of her department chairman — a strong negative factor which the court simply ignored by not citing it.

actions of the faculty review committees.[8] See also *Green, supra*, at 250-251. If the evidence permits a finding of a rational, nondiscriminatory basis for an academic promotion decision by a peer committee, then this decision should not be set aside even though a court might also reasonably infer discrimination from the totality of the evidence, or conclude independently that a candidate was qualified for promotion. The judicial function is not well served when a trial court sifts the testimony and exhibits for generalized evidence to support a contrary inference rather than focusing on the actions of the body responsible for making the challenged decision.

After an extensive trial (74 days) pursuant to §§1983 and 1985(3) and Title VII, the District Court in *Johnson, supra*, in a comprehensive opinion, expressed the principle of judicial review as follows:

> "... [T]he decisions as to the weight to be given ... [the] criteria and the extent to which a given ... professor meets them or falls short is a matter which primarily must be handled by the tenured faculty who are in the best position to make these judgments. See *Peters* v. *Middlebury College*, [409 F.Supp. 857 (D.Vt.1976)]." 435 F.Supp., at 1357.

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[8] The "discrimination" proscribed by Title VII is not a new and different violation:

> "The concept of 'discrimination' of course was well known at the time of the enactment of Title VII, having been associated with the Fourteenth Amendment for nearly a century and carrying with it a long history of judicial construction. When Congress makes it unlawful for an employer to 'discriminate ... on the basis of ... sex ...', without further explanation of its meaning, we should not readily infer that it meant something different from what the concept of discrimination has traditionally meant." *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 145 (1976).

"All the court can do is to determine whether reasonable good faith was shown and whether fair consideration was given to the matter by those having the right to decide *so as to determine that sex* (or race) *discrimination was not actually a factor in arriving at the decision.* If the criteria used and the procedures followed were reasonable and rationally related to the decision reached, this is about as far as the court can go. *Cussler v. University of Maryland* [430 F.Supp. 602 (D.Md.1977)]." 435 F.Supp., at 1357 (emphasis supplied).

Contrary to the restraint shown in other circuits, the courts below in the instant case gave little, if any, deference to the professional judgment of the faculty committees,[9] disregarded their operations and motivations, and drew independent inferences from raw statistics and incidents outside the promotion review process.[10] Certiorari should be granted to resolve the disparity presented by the judgment below. The precedent affects not only future court decisions but will influence numerous out-of-court dispositions as well and, perhaps most unpropitiously, undermines the professional tradition of peer review without its ever having been directly put to the test.

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[9] *See* p. 5, *supra.* The Court of Appeals discounted the significance of the Faculty Appeals Committee's finding, reported by its chairwoman, a full professor, to the president that no evidence indicated sex discrimination impeded the plaintiff's promotion in 1974-75, the year when the trial court concluded it had. A-7, n. 6; B-25, Finding #7)

[10] *See* Court of Appeals' Opinion, at A-16, 17, 18, where the court recounts the statistical evidence it found most persuasive; at A-19, where the court notes the "striking evidence" presented by the affirmative action coordinator's behavior and criticizes the college's affirmative action plan.

II. This Court Should Grant Certiorari To Extend to Promotion Cases the Rule of *Hazelwood* v. *United States,* — U.S. —, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977) That in Evaluating Employment Statistics Under Title VII, the Frame of Reference Must Be the Relevant Labor Pool.

In evaluating the number of women on the Keene State College faculty, the trial court disregarded the number of women in the applicable labor pool. The concept was never considered. So far as appears, the trial court's only frame of reference was the general population. The finding of a pattern of discrimination in hiring and promotion was therefore based on invalid statistical analysis. See *Hazelwood, supra,* 53 L.Ed. 2d, at 776-781 and n.13, 14, regarding statistical methodology and relevance.

The Court of Appeals conceded that 20% of the faculty were women, "a figure which compares fairly favorably with the percentage of women in the applicable labor pool". (A-17) But, the Court of Appeals then failed to apply the concept of the applicable labor pool to this case. Like the District Court, the appeals court indiscriminately lumped together hiring and promotion figures, ignoring the role of the peer review system in promotions, and overlooking the fact that in evaluating promotion statistics the applicable labor pool must be the number of eligible women on the faculty. And, since 18% to 20% of the college's faculty were women, the lawful statistical measure for female promotions, following *Hazelwood,* would also be 18% to 20%.

Between 1970 and 1976, 16 people were promoted to full professor. Three were women, or 19% of the total—almost exactly the percentage in the labor pool. Of the 33 promoted to associate professor, 7, or 21%, were women—slightly more than the percentage of women in the pool.

The Court of Appeals simply ignored these comparative figures and instead based its affirmance of the District Court on an evaluation of the absolute number of faculty in the respective ranks in a given year. This was improper in a promotion case. One of the specific, objective criteria for promotion hidden by the statistical table relied on by the court (A-17) is the "minimum service in grade" requirement.[11] The fact that there were a given number of male full professors and a much smaller number of female full professors in a given year has no tendency to establish discrimination *in promotion* unless it is also shown that the female associate professors on the roll at least satisfied the service in grade requirement. No such showing was made. Despite exhaustive discovery of personnel files, there is no evidence that any female who applied for promotion to full professor at Keene State College ever failed to achieve that rank. The statistics relied on below were so unrefined as to be meaningless. Their use to infer discrimination in an individual promotion case is arbitrary and prejudicial, contrary to the direct evidence of actual promotion rates cited, *supra,* and in conflict with this Court's holding in *Hazelwood.*

The peer review system followed at Keene, as a matter of course, evaluates the factors of service in grade and other prerequisites in passing on applications for promotion. At the relevant times in this case, the system did not discriminate against women: in 1972-73, 40% of the women and only 25% of the men were approved by the peer committee (for promotion and/or tenure); while in 1974-75, 84% of the women and only 50% of the men were given favorable recommendations.

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[11] Instructor to assistant professor — 3 years.
Assistant professor to associate professor — 4 years.
Associate professor to full professor — 4 years.

Other significant factors which are not properly accounted for in the table of numbers, at A-17, include interacting effects of tenure, attrition, vacancies and qualified applicants as well as the fact that Title VII had no application to Keene State College prior to 1972 when the Equal Employment Opportunity Act (Pub. L. No. 92-261, 86 Stat. 103) extended Title VII to state institutions.

Hazelwood was decided by this Court on June 27, 1977, after the decision by the District Court in the present case but before the Court of Appeals' decision. Petitioners submit that the appeals court erred in disregarding the implications of *Hazelwood* for academic promotion cases.

III. This Court Should Grant Certiorari To Establish That *McDonnell Douglas* Does Not Require Defendants in an Individual Disparate Treatment Case To Disprove a Discriminatory Pattern, and This Court's Decision in *Teamsters* Has Not Added This Requirement to the Defendants' Burden "To Articulate Some Legitimate, Nondiscriminatory Reason for the Employee's Rejection". 411 U.S., at 802.

Both courts below concluded that defendants failed "to rebut the inference [created by] the plaintiff's more striking statistics" (A-18; B-25, Finding #10), but this Court in *McDonnell Douglas* imposed no such burden on the defendant. In that case, the employer refused to rehire the plaintiff because he had engaged in deliberate, unlawful activity against it. The Court of Appeals had dismissed this reason as a " 'subjective' rather than objective criterion which 'carries little weight in rebutting charges of discrimination' " (411 U.S., at 803, citing 463 F.2d, at 352); but this Court disagreed, saying:

> ". . . [W]e think the court below seriously underestimated the rebuttal weight to which petitioner's reasons were entitled." 411 U.S., at 803.

Similarly, in the present case the courts below underestimated, and apparently lost sight of, the fact that the named defendants were following the recommendations of the Faculty Evaluation Advisory Committees not to promote the plaintiff in 1973 and 1975. They disregarded the fact that peer approval is a prerequisite to promotion. (This is *not* a case where the defendants arbitrarily refused to follow the committee' *favorable* recommendation.) The defendants articulated a legitimate reason—namely, that plaintiff was not entitled to promotion because a committee of her peers found her qualifications insufficient. The defendants had no reason to believe that the committees' rejection of the plaintiff's application in either year was sexually premised. *See* pp. 5, 14, *supra*.

This Court also enunciated the rule in *McDonnell Douglas* that the plaintiff in order to prevail must show that the reasons offered by the defendant are in fact pretext. Following that case, the plaintiff here could demonstrate that defendants' reasons were pretext by showing that men without peer committee approval were nevertheless promoted by the defendants, or that the committees which passed on her credentials in 1972-73 and 1974-75 acted out of sexual bias so that defendants should not have relied on their recommendations. The evidence, however, was to the contrary.

The Court of Appeals sets forth its understanding regarding the allocation of the burden of proof in cases alleging disparate treatment in Part IIA of its opinion at A-14, 15, 16. The court apparently believed that plaintiff's combination of generalized statistics and instances could provide sufficient evidence of discrimination to support an inference of motive on defendants' part (motive being recognized by the court as a requisite element in disparate treatment cases, at A-9, 10) and also meet the plaintiff's specific burden of showing that defendants' reasons were

pretext. Defendants were required in the court's model to "prove an absence of discriminatory motive" (A-15) by disproving a general discriminatory pattern. The court cites *McDonnell Douglas* for the proposition that an employer's general policy and practice, and statistics, are relevant in proving pretext but omits this Court's cautionary language about "individualized" decisions. (A-15, citing 411 U.S. at 804-805) The Court of Appeals notes that "[a] combination of statistics and specific instances of discrimination provided sufficient evidence of discrimination in *Teamsters*". (A-15, citing 431 U.S. at 433.) However, this analysis and the mixed application of legal models from *McDonnell Douglas*, an individual disparate treatment case pursuant to §701(a)(1) of Title VII [42 U.S.C. §2000e-2(a)(1)], and from *Teamsters*, a "pattern or practice" disparate treatment case brought by the Government under §707(a) [42 U.S.C. §2000e-6(a)], have imposed an improper burden on defendants in conflict with *McDonnell Douglas*.

The citation from *Teamsters* by the Court of Appeals at A-15 is misdirected. In *Teamsters*, statistical proof was approved as a method to establish a prima facie case of employment discrimination in a "pattern or practice" case —not as a method for showing that defendants' articulated reasons for an individual promotion decision are pretext. The use of generalized statistics to prove pretext in an individual disparate treatment case—even where the statistics are shown to be statistically significant and valid—is warned against by this Court in *McDonnell Douglas:*

> "We caution that such general determinations, while helpful, *may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason* for refusing to rehire." 411 U.S., at 805 n.19. (emphasis supplied).

In the application of its hybrid legal model to the facts, the Court of Appeals in Part IIB of its opinion does not even mention the legitimate, nondiscriminatory reasons articulated by the defendants nor discuss how the plaintiff's generalized statistics and instances involving other persons were relevant to showing pretext. (A-16 through 19) The court speaks solely of defendants' failure to dispel the inference of discrimination created by plaintiff's generalized statistics and incidental evidence.

But, defendants according to this Court's analysis in *McDonnell Douglas* were entitled to have the reasons they articulated addressed by plaintiff's evidence in rebuttal. Defendants were not obligated to carry a burden of proof equivalent to that of a defendant in a "pattern or practice" action, such as *Teamsters,* or that of a defendant in a class action, such as *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747 (1976). Even if the Court of Appeals deemed that plaintiff established two prima facie cases—one through statistics and instances, and one through satisfying the four-part standard of *McDonnell Douglas* (A-16)—defendants were still obligated only to show they had a justifiable reason for not promoting the plaintiff.

The Court of Appeals for the Eighth Circuit has considered the issue in *Naraine* v. *Western Electric Co.,* 507 F.2d 590 (1974). The Court of Appeals in the present case cites *Naraine* to support its burden of proof analysis (A-14), yet the Eighth Circuit's decision stands in direct conflict to the application by the court below. The Eighth Circuit held:

> "The fallacy in [plaintiff's] reasoning is that he assumes that the burden is on [the defendant] to prove non-discrimination. However, the burden is on him to affirmatively prove . . . discrimination. . . ." 507 F.2d, at 593.

• • •

> "Even assuming that [plaintiff] had made out a prima facie case [through statistical data], we conclude here that [defendant] has provided satisfactory explanation for the discharge . . . and has therefore rebutted the charges brought by [plaintiff]." 507 F.2d, at 594.

Conversely, this Court in *Teamsters* rejected the petitioners' contention that the Government's (plaintiff's) burden of proof in a "pattern or practice" case must be equivalent to that outlined in *McDonnell Douglas,* a private, individual action. 431 U.S. 324, at ___-___, 52 L.Ed.2d, at 428, 429. Now, this Court should grant certiorari to reject the theory of the courts below that the defendants in a private, individual action should meet a burden equivalent to that outlined in *Teamsters.*

Conclusion

For the reasons stated, the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

Nos. 77-1243, 77-1244

CHRISTINE M. SWEENEY,

PLAINTIFF, APPELLEE,

v.

BOARD OF TRUSTEES OF
KEENE STATE COLLEGE, ET AL.,

DEFENDANTS, APPELLANTS.

CHRISTINE M. SWEENEY,

PLAINTIFF, APPELLANT,

v.

BOARD OF TRUSTEES OF
KEENE STATE COLLEGE, ET AL.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW HAMPSHIRE

[HON. HUGH H. BOWNES, *U.S. District Judge*]

Before COFFIN, *Chief Judge*
TUTTLE,* *Circuit Judge*
CAMPBELL, *Circuit Judge*

Joseph A. Millimet, with whom *Devine, Millimet, Stahl & Branch*, was on brief, for Board of Trustees of Keene State College et al.

Jack B. Middleton, with whom *Robert A. Wells*, and *McLane, Graf, Greene, Raulerson & Middleton Professional Association*, were on brief, for Christine M. Sweeney.

January 4, 1978

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*Of the Fifth Circuit, sitting by designation.

TUTTLE, *Circuit Judge.* This appeal presents important issues relating to the existence of discrimination against women in the awarding of promotions and the fixing of salaries at Keene State College. Dr. Christine Sweeney, a faculty member in the Department of Education at Keene since 1969, failed twice in her efforts to achieve promotion to the rank of full professor before finally succeeding in 1976. Attributing her earlier failures to sexual bias, she seeks a backdating of her promotion to the date of her first attempt and an accompanying adjustment in her salary for the intervening years. In addition, the plaintiff alleges that sex discrimination accounts for the disparity between the average salaries of males and females on the Keene faculty and claims that she has been paid less than men who carry a substantially equal workload.

Dr. Sweeney has brought suit under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.*, as amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103; the Equal Pay Act of 1963, 29 U.S.C. § 206(d), as amended by the Education Amendments of 1972, 29 U.S.C. § 213(a), Pub. L. No. 92-318, 86 Stat. 235; Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.;* 42 U.S.C. § 1983, and the Fourteenth Amendment to the United States Constitution. Named as defendants are Keene State College, its Board of Trustees,[1] its president, and two former deans.

Following a four-day trial, the United States District Court for the District of New Hampshire ruled against Dr. Sweeney on the Equal Pay, § 1983, Fourteenth Amendment, and Title IX counts, but permitted her a partial recovery under Title VII. The district court found that

[1] Keene State College is a division of the University of New Hampshire. The same Board of Trustees govern all of the divisions of the University of New Hampshire System.

Dr. Sweeney had been a victim of sex discrimination in her second effort to gain promotion and ordered her promotion backdated to 1975, with the appropriate back pay. The court also awarded the plaintiff attorneys' fees and costs of $17,766.56. Although the court specifically found a pattern of sex discrimination against females in hiring, promotion, and salaries, no injunction against further discrimination was issued.

In their appeal, the defendants seek to persuade this Court that the plaintiff's evidence was insufficient to prove a violation of Title VII. They further contend that Dr. Sweeney has failed to prove that a discriminatory motive accounted for her unsuccessful promotion attempt. Dr. Sweeney cross-appeals from certain adverse findings of fact and rulings of law, and particularly seeks reversal of the trial court's holding that she failed to prove sex discrimination as to her level of pay as an associate professor or professor. For the reasons discussed below, the judgment of the district court is affirmed.

I.

Keene State College, a division of the University of New Hampshire, is a small liberal arts college located in Keene, New Hampshire. Originally dedicated to the training of teachers, it presently grants bachelor's degrees in a variety of other fields as well as a master's degree in education. Dr. Sweeney earned a bachelor of education degree from Keene in 1943, a master of arts from Catholic University in 1956, and a Ph.D. from Catholic University in 1962. She taught at the primary and secondary levels from 1943 until 1960 and served as a graduate assistant at Catholic University in the 1961-62 school year. Appointed an instructor at Catholic University in 1962, Dr. Sweeney remained there until 1966, when she joined the faculty at Emmanuel College as an assistant professor. She was promoted to the rank of associate professor at Emman-

uel, effective in the fall of 1968, with an anticipated salary of $9,000, but left that school before the start of the 1968-69 academic year. In January, 1969 Dr. Sweeney was appointed an associate professor of education at Keene and received $5,000 for the spring semester. Her initial position was supervisor of student teaching, but she has subsequently assumed various other teaching responsibilities in the department of education. In addition to her course load, Dr. Sweeney has served on numerous college and department committees and on the Professional Standards Board for the State Board of Education. This summary of her credentials is by no means exhaustive but suffices to demonstrate that Dr. Sweeney possessed the education and experience typical of college teachers.

From the record it appears that Dr. Sweeney's career at Keene went smoothly until 1971. In the spring of that year, she was selected by a committee within her department to accompany a group of students to England the following fall. The trip was part of a student exchange program developed by the Department of Education, and Dr. Sweeney had been quite active in the program. At the time of the plaintiff's selection, a man was selected for a second fall trip and another woman was selected as an alternate. Final approval of the faculty advisors rested with Dean Clarence Davis, and he refused to permit Dr. Sweeney to make the trip, selecting the alternate instead. Although the dean refused to tell the plaintiff his reasons for this decision, he testified at trial that he had acted upon the recommendation of the coordinator of the program, a female, who had advised him that the alternate was better qualified.

Plaintiff attempted to convince the trial court that this decision resulted from sex discrimination by showing that no women have been selected for subsequent trips and that no men have been disapproved. However, the trial

court specifically found that the dean's decision rested on factors other than sex discrimination. This fact finding is amply supported by the evidence, because a woman took Dr. Sweeney's slot and the unfavorable recommendation came from a woman. Nevertheless, the incident plays a role in later developments and is mentioned for that reason. Dr. Sweeney testified that the incident alerted her to the possible existence of sex bias on campus. More importantly, she feared that the refusal to permit her to make the trip would affect her later efforts to seek promotion.

In spite of the England incident, Dr. Sweeney was granted tenure in 1972 with no apparent difficulty. In the 1972-73 academic year, she sought promotion to the rank of full professor, the highest rank in the academic setting.[2] Like many other colleges and universities, Keene employs a peer-review system for screening requests for tenure and promotion. These requests, initiated either by the faculty member or by the department chairman on behalf of the faculty member, are sent to the dean of the college, who, in turn, forwards the matter to the Faculty Evaluations Advisory Committee (FEAC), a five-member panel elected each year by the entire faculty from persons in the highest two academic ranks. The FEAC measures the record and qualifications of the applicant against the standards set forth in the faculty manual[3] and makes a recommendation to the dean either for or against promotion.

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[2] The normal progression in academic rank is from instructor to assistant professor, associate professor, and, finally, full professor.

[3] The criteria specified in the faculty manual for promotion are teaching effectiveness, scholarly qualifications, service to the college, and community activities. The Faculty Senate has issued guidelines for interpreting these criteria. In addition, a teacher must normally spend a minimum number of years in one rank before ascending to the next level. For promotion to the rank of full professor, the faculty manual calls for four years as an associate professor.

Although the FEAC functions in an advisory capacity, its recommendations are usually adopted by the dean. If the FEAC recommends promotion and the dean concurs, the request is sent to the Board of Trustees for final approval. If, however, the dean concurs in a negative FEAC recommendation, the applicant can seek reconsideration by the dean and the FEAC. If still unsuccessful, an appeal can be taken to the Faculty Appeals Committee (FAC), also composed of elected faculty members. This panel's authority is limited to determining whether due process has been accorded or whether new evidence has been presented. The FAC presents its findings to the college president, who in turn submits any favorable recommendations to the Board of Trustees. The president expressed a reluctance to overturn an FEAC decision unless the FAC found arbitrary or unfair action.

The plaintiff was recommended for promotion by her department and its chairman, Dr. Paul Blacketor, during the 1972-73 school year.[4] An all-male FEAC voted unanimously against promotion and Dean Davis concurred. Dr. Sweeney was given no reasons for the adverse decision. Upon the advice of Dean Davis, Dr. Sweeney secured letters of support from faculty members and persons outside Keene to assist the FEAC in its reconsideration, but to no avail. The plaintiff appealed to the FAC in July 1973, citing the lack of reasons as evidence of unfairness. In a letter to President Leo Redfern eight months later, the FAC stated that the FEAC had refused to explain its adverse decision and that Dean Davis had declined to discuss his disapproval of Sweeney for the England trip. Therefore, the committee could not determine whether the trip incident had influenced the FEAC decision. Giving Dr. Sweeney the benefit of the doubt on the question of unfairness, the FAC strongly recommended that Dr. Sweeney be considered by the current (1973-74) FEAC even though she herself had not initiated a new request for promotion during that academic year because of her pending appeal. The president declined to permit what he viewed as a short-circuiting of normal procedures and notified the FAC in April of 1974 of his decision. Shortly thereafter, Sweeney filed charges of sex discrimination with the New Hampshire Commission of Human Rights and the EEOC.

[4] The promotion would have been effective July 1973. By that time Dr. Sweeney would have met the requirement for serving four years before promotion. See note 3, *supra*.

The plaintiff sought promotion again during the 1974-75 academic year. A new FEAC, entirely male, voted against her promotion and the dean once again concurred. This time, however, the dean informed the plaintiff by letter that the decision was based on her failure to meet the qualifications enunciated in the faculty manual and he quoted a portion of it to her.[5]

Alleging sex discrimination in her second appeal to the FAC, Dr. Sweeney submitted additional information to that committee to counter each of the objections cited by Dean Davis. After examining her case, the FAC sent a lengthy letter to President Redfern decrying the unprofessional treatment of the plaintiff and insisting that she be given more detailed reasons for the adverse decision. The FAC, one of whose members was a woman, also stated that it had been unable to find evidence of sex discrimination.[6]

[5] The dean's letter stated:

> This decision is based upon the evaluation of FEAC which indicates that you have not fulfilled the qualifications as stated in the Faculty Manual; namely, that your teaching and research has [sic] not been "marked by the perspective of maturity and experience, or by some creative attribute generally recognizable in the academic world as a special asset to a faculty."

[6] The testimony at trial indicated, however, that the FAC did not undertake an exhaustive investigation into the sex discrimination charge.

As a result of this prodding by the FAC, President Redfern conferred with Dean Davis and former FEAC members to ascertain the grounds for her nonpromotion. The list of criticisms which the president conveyed to Dr. Sweeney included allegations that she had narrow, rigid, and old-fashioned views, tended to personalize professional matters, kept minutes of the graduate faculty meetings which fell below a professional caliber, and emphasized to her students the importance of maintaining an even height of window shades in a classroom.[7] This meeting of the plaintiff and President Redfern, which occurred in November 1975, apparently marked the end of her second appeal.

Dr. Sweeney's third try for promotion, during the 1975-76 academic year, was successful. The FEAC, composed of four men and a woman, voted unanimously in her favor only a few months after the plaintiff's meeting with the president. Her promotion was effective July 1, 1976.

At trial, the plaintiff presented statistical evidence to substantiate her claim of sex discrimination. She and other witnesses testified about specific instances of allegedly sex-biased treatment. Experts in the areas of education and sex discrimination were also called to testify. In a lengthy opinion which contains a thorough review of the testimony and exhibits, the district court found that the evidence established a pattern of sex discrimination at Keene State College in hiring, promotion, and salaries. Applying the approach employed by the Supreme Court in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), the district court held that the plaintiff had established a prima facie case of sex discrimnation in her second pro-

[7] This last criticism was characterized by some witnesses as an insulting joke often made flippantly about teachers. Dr. Redfern, however, stated that he had taken it as a serious assessment of her attitudes.

motion effort in violation of Title VII and that the defendants had not rebutted her evidence. Based on the plaintiff's qualifications, length of time at Keene, and her rapport with her colleagues, the court believed that Dr. Sweeney would not have been promoted in her first try even if she had been a male. Although the court found that the defendants applied a double standard in salaries, hiring, and promotion, the court held that the plaintiff had failed to prove that her own salary was less than males with the same or similar qualifications and responsibilities. The district court also found that Keene's affirmative action program was ineffective.

II.

The defendants strenuously argue on appeal that Dr. Sweeney has provided insufficient proof of discriminatory motivation to support a finding of disparate treatment. We recognize that disparate treatment cases, such as this one, differ from disparate impact cases, such as *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971).[8] We also recognize

[8] The distinction between disparate treatment and disparate impact cases was explained by the Supreme Court in International Brotherhood of Teamsters v. United States:

> "Disparate treatment" such as alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. *Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.* . . . Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII. . . .
>
> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involves employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive, we have held, is not required under a disparative impact theory. Compare, *e.g., Griggs* v. *Duke Power Co.,* 401 U.S. 424, 430-432, with *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802-806.

45 U.S.L.W. 4506, 4509 n. 15 (U.S. May 31, 1977) (citations omitted) (emphasis added).

that proof of discriminatory motive is critical in a disparate treatment case. *International Brotherhood of Teamsters* v. *United States,* 45 U.S.L.W. 4506 (U.S. May 31, 1977); *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973). This is necessarily so because the gist of a disparate treatment claim is that an employee has been treated less favorably than others because of race, color, religion, sex, or national origin. What we reject is an effort by the defendants to elevate the quantum of proof to such a level that a litigant is necessarily doomed to failure.

The Supreme Court has never said that an individual plaintiff seeking to establish a claim of disparate treatment in violation of Title VII must present direct evidence of discriminatory intent. Even in *Washington* v. *Davis,* 426 U.S. 220 (1976), which held that discriminatory intent is an essential element of a claim based upon the equal protection clause of the Fourteenth Amendment, the Supreme Court recognized that circumstantial evidence was one means of proving purposeful discrimination. The Court stated in *Davis*:

> Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.

426 U.S. at 242.

Particularly in a college or university setting, where the level of sophistication is likely to be much higher than in other employment situations, direct evidence of sex discrimination will rarely be available. The Congress was no doubt aware of this fact when it extended Title VII to colleges and universities for the first time in 1972.[9] The legislative history contains numerous indications of Congress' concern for the status of women in academia.[10] Statistical evidence presented to the Congress at that time made glaringly clear that "[w]hen they have been hired into educational institutions, particularly in institutions of higher education, women have been relegated to positions of lesser standing than their male counterparts."[11] Legislative concern over this sexual imbalance is further evidenced in the passage of Title IX of the Education Amendment of 1972, 20 U.S.C. § 1681 (Supp. IV, 1974).

Of ccurse, legislative sympathy for the plight of female college teachers does not alleviate Dr. Sweeney's obligation to prove herself the victim of sex discrimination in order to recover under Title VII. In fact, the difficulty of her task is underlined by the lack of cases in which plaintiffs have succeeded in similar challegenes to sex discrimination in academia. Admittedly, most if not all of these female plaintiffs have lost. *Keyes* v. *Lenoir Rhyne College,*

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[9] Title VII, as originally enacted, contained an exemption for the employment practices of educational institutions as to teachers. The Equal Employment Opportunity Act of 1972, 86 Stat. 103, § 3 (1972), eliminated the exemption and also extended Title VII to state and federal governments.

[10] A portion of the House Report states:

> There is nothing in the legislative background of Title VII, nor does any national policy suggest itself to support the exemption of these educational institution employees — primarily teachers — from Title VII coverage. Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment.

H. Rep. No. 92-238, 92nd Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 2155.

> Senator Bayh found the evidence of sex discrimination in colleges and universities "truly appalling." 118 Cong. Rec. 117 (1972) (remarks of Senator Bayh). Senator Williams characterized it as "gross" and "blatant." 118 Cong. Rec. 1992 (1972) (remarks of Senator Williams).

[11] H. Rep. No. 92-238, 92nd Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 2155.

552 F.2d 579 (4th Cir.), *cert. denied,* 46 U.S.L.W. 3258 (U.S. Oct. 18, 1977); *Faro* v. *New York University,* 502 F.2d 1229 (2d Cir. 1974); *Green* v. *Bd. of Regents of Texas Tech University,* 474 F.2d 594 (5th Cir. 1973) (suit under § 1983); *Johnson* v. *University of Pittsburgh,* No. 73-120 (W.D. Pa., dec. Aug. 1, 1977), dissolving preliminary injunction issued in 359 F. Supp. 1002 (W.D. Pa. 1973); *Peters* v. *Middlebury College,* 409 F. Supp. 857 (D. Vt. 1976); *Van deVate* v. *Boling,* 379 F. Supp. 925 (E.D. Tenn. 1974). Whether the evidence presented in these cases fell significantly short of the evidence in this case we do not know.[12] However, we voice misgivings over one theme recurrent in those opinions: the notion that courts should keep "hands off" the salary, promotion, and hiring decisions of colleges and universities.[13] This reluctance no

[12] The cases which have reached the Court of Appeals level all presented plaintiffs appealing from unfavorable findings of fact. Therefore, the appeals were controlled by the "clearly erroneous" standard of appellate review. Fed. Rule Civ. P. 52(a). *See, e.g.,* Faro v. New York University, 502 F.2d 1229 (2d Cir. 1974). By contrast, several of the fact findings in this case favored Dr. Sweeney and the "clearly erroneous" standard works to her advantage.

[13] The Court of Appeals for the Second Circuit expressed this viewpoint in Faro v. New York University, 502 F.2d 1229, 1231-32 (2d Cir. 1974):

> Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision. Dr. Faro would remove any subjective judgments by her faculty colleagues in the decision-making process by having the courts examine "the university's recruitment, compensation, promotion and termination and by analyzing the way these procedures are applied to the claimant personally" (Applt's Br. p. 26). All this information she would obtain "through extensive discovery, either by the EEOC or the litigant herself" (*Id.*). This argument might well lend itself to a *reductio ad absurdum* rebuttal. Such a procedure, in effect, would require a faculty committee charged with recommending or withholding advancements or tenure appointments to subject itself to a court inquiry

doubt arises from the courts' recognition that hiring, promotion, and tenure decisions require subjective evaluation most appropriately made by persons thoroughly familiar with the academic setting.[14] Nevertheless, we caution against permitting judicial deference to result in judicial abdication of a responsibility entrusted to the courts by Congress. That responsibility is simply to provide a forum for the litigation of complaints of sex discrimination in

> at the behest of unsuccessful and disgruntled candidates as to why the unsuccessful was not as well qualified as the successful. This decision would then be passed on by a Court of Appeals or even the Supreme Court. The process might be simplified by a legislative enactment that no faculty appointment or advancement could be made without the committee obtaining a declaratory judgment naming the successful candidate after notice to all contending candidates to present their credentials for court inspection and decision. This would give "due process" to all contenders, regardless of sex, to advance their "I'm just as good as you are" arguments.

But see Egleston v. State University College at Genesco, 535 F.2d 752 (2d Cir. 1976) (cautions against hasty dismissal of complaint when plaintiff has stated valid Title VII claim).

[14] In "blue collar" employment situations courts have tended to view subjective criteria with suspicion. For example, in Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972), a black employee complained that his promotion hinged on receiving a favorable recommendation from a foreman, all of whom were white. The Court of Appeals for the Fifth Circuit recognized that subjective criteria contain "no safeguards . . . to avert discriminatory practices" and provide "a ready mechanism for discrimination . . . much of which can be covertly concealed." *Id.* at 359. See also Wade v. Mississippi Coop. Extension Serv., 528 F.2d 508 (5th Cir. 1976).

Of course, subjective evaluations are essential in certain positions. *See* Rogers v. International Paper Co., 510 F.2d 1340 (8th Cir. 1975) (subjective criteria not unlawful per se). Judicial tolerance of subjective criteria seems to increase with the complexity of the job involved. *See* Peters v. Middlebury College, 409 F. Supp. 857 (D. Vt. 1976). Assessment of teaching ability clearly is a matter of subjective judgment. "A professor's value depends upon his creativity, his rapport with students and colleagues, his teaching ability, and numerous other intangible qualities which cannot be measured by objective standards." Lewis v. Chicago State College, 299 F. Supp. 1357, 1359 (N.D. Ill. 1969).

institutions of higher learning as readily as for other Title VII suits.

A.

It is clear from *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and *International Brotherhood of Teamsters* v. *United States*, 45 U.S.L.W. 4506 (U.S. May 31, 1977), that an individual plaintiff who alleges disparate treatment because of her sex must prove that her unfavorable treatment was sexually premised. Both of those cases explore the nature of proof and the allocation of the burden of proof in cases alleging disparate treatment. Neither requires *direct* proof of discriminatory motive.

As we understand those cases, a plaintiff bears the initial burden of presenting evidence sufficient to establish a prima facie case of discrimination. The burden then shifts to the defendant to rebut the prima facie case by showing that a legitimate, non-discriminatory reason accounted for its actions. If the rebuttal is successful, the plaintiff must show that the stated reason was a mere pretext for discrimination.[15] The ultimate burden of persuasion on the issue of discrimination remains with the plaintiff, who must convince the court by a preponderance of the evidence that he or she has been the victim of discrimination. *King* v. *Yellow Freight System*, 523 F.2d 879 (8th Cir. 1975); *Naraine* v. *Western Electric Co.*, 507 F.2d 590 (8th Cir. 1974).

The quantum of proof sufficient to constitute a prima facie case cannot be expressed in any general rule.[16] In

[15] We do not read General Electric Co. v. Gilbert, 429 U.S. 125 (1976), as altering *McDonnell Douglas*. In *Gilbert* the Court found that the plaintiff had not shown a disproportionate impact on women as a result of the employer's exclusion of pregnancy disabilities from a health insurance plan. The issue of disparate treatment was not involved.

[16] As the Supreme Court noted in *McDonnell Douglas*: "The facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." 411 U.S. at 802 n. 13.

McDonnell Douglas, where the plaintiff alleged that racial discrimination motivated his employer's refusal to rehire him after he had participated in an illegal stall-in, the Supreme Court found that a prima facie case had been made out by the plaintiff's showing that he belonged to a racial minority, that he was a qualified applicant for an existing job opening, that he was rejected despite his qualifications, and that the employer continued to seek applicants of his qualifications for the job opening after his rejection. 411 U.S. at 802. These requirements do not impress us as imposing a very arduous burden upon a plaintiff. Moreover, in requiring the defendant to prove absence of discriminatory motive, the Supreme Court placed the burden squarely on the party with the greater access to such evidence.[17] In suggesting the kinds of evidence which would be relevant in proving that the employer's refusal to rehire was a pretext, the Court listed an employer's general policy and practice with respect to minority employment, prior treatment of the plaintiff, and statistics. 411 U.S. at 804-05.

A combination of statistics and specific instances of discrimination provided sufficient evidence of discrimination in *Teamsters*. There the Court reiterated the importance of statistics in proving employment discrimination:

> We have repeatedly approved the use of statistical proof, where it reached proportions comparable to those in this case, to establish a prima facie case of racial discrimination in jury selection cases . . . . Statistics are equally competent in proving employment discrimination. We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In

[17] *See* Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5 (1959).

short, their usefulness depends on all of the surrounding facts and circumstances.

45 U.S.L.W. at 4510 (footnote and citations omitted).

It is clear, then, that a plaintiff may rely upon inferential proof of discriminatory motive in a disparate treatment case. *Muller* v. *U.S. Steel Corp.*, 509 F.2d 923 (10th Cir. 1975); *Marquez* v. *Omaha District Sales Office, Ford Division*, 440 F.2d 1157 (8th Cir. 1971); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970); *Blue Bell Boots, Inc.* v. *EEOC*, 418 F.2d 355 (6th Cir. 1969). We turn now to an analysis of the evidence in the instant case.

B.

Dr. Sweeney clearly showed that she was a member of a protected class within Title VII, that she was qualified for promotion,[18] that she was rejected, and that others of her qualifications were promoted. She went further and presented statistical evidence which supports an inference of sex bias in promotion decisions. Most persuasive of the statistics was the fact that only four women in the entire history of Keene State College have achieved the rank of full professor. There have never been more than two women professors in any given academic year and this has occurred in only two years since 1968. In all other years since 1968, only one woman occupied the top rank. In contrast, the number of male professors has gone from

[18] The very fact of Dr. Sweeney's ultimate promotion demonstrates that she was qualified for promotion. The record does not reveal any significant change in her credentials from 1973 to 1976, although she did become more active in Keene's reading program. Because the plaintiff carried this insignia of collegiate approval into her trial, the district court was not required to serve as super-FEAC in passing upon her qualifications. Furthermore, several witnesses testified that Dr. Sweeney was qualified for promotion as early as 1973.

ten in 1969-70[19] to 23 in 1975-76. A similarly striking discrepancy exists in the rank of associate professor. There were only three female associates in 1969-70 and six in 1975-76, while the males in that rank numbered 17 in 1969-70 and 35 in 1975-76. While women represent approximately 20% of the faculty, a figure which compares fairly favorably with the percentage of women in the applicable labor pool, males held slightly more than 90% of the full professor slots in 1969-1970 and 92% in 1975-76. In fact, there have been more male professors than male instructors every year since 1969-70, despite the defendants' insistence that entry to the top rank is a significant achievement reserved for the excellent few.

In spite of their overall percentage on the faculty, women presently outnumber men in the instructor level. While many of the women in these lower levels may be new faculty members, that still does not account for the striking imbalance in the upper ranks. Moreover, the evidence showed that while men had been appointed to the faculty as full professors on many occasions since 1969, no woman has ever been appointed initially above the rank of associate

[19] The figures quoted here were distilled by the district court from answers to the plaintiff's interrogatories. The plaintiff's brief contains slightly different figures. The differences apparently occurred because the district court excluded the teaching laboratory, the school library, student services auxiliary enterprises, and the administration from its figures, while the plaintiff tabulated statistics for the total number of academic employees. The plaintiff's table shows:

Year	Instructor		Assistant Professor		Associate Professor		Full Professor	
	F	M	F	M	F	M	F	M
1969-1970	11	14	8	35	4	15	1	13
1970-1971	14	13	10	35	4	23	2	15
1971-1972	13	15	9	39	3	23	1	17
1972-1973	17	16	11	40	3	25	1	18
1973-1974	14	9	5	34	6	26	1	19
1974-1975	14	9	7	40	9	34	1	22
1975-1976	11	5	13	42	8	36	2	24

professor. This fact supports the district court's finding of a pattern of discriminatory hiring. Dr. Sweeney also showed that no female has ever been promoted to the highest rank without a terminal degree, while several male professors do not possess such a degree. This statistical evidence supports the district court's finding that a double standard was applied in promotion decisions. The evidence also showed that women were underrepresented in the English, Art, History, Biology, Psychology and Industrial Education Departments.

The defendant attempted to rebut these statistics by pointing to highly qualified men who remained in the lower ranks longer than Dr. Sweeney. While this evidence is informative, the district court was not required to find that it totally dispelled the inference of discrimination created by the other statistics. Likewise, evidence of males who failed to be promoted on their first try does not necessarily rebut the inference of the plaintiff's more striking statistics. At best, these tales of individual males' struggles account for the district court's conclusion that Dr. Sweeney would not have achieved promotion in her first effort even if she had been a male. It is true that the defendants were able to find instances where an individual male of superior qualifications encountered difficulties in reaching the level of professor. But these examples were countered by other situations where females fared worse. In short, the plaintiff did not prove the existence of a completely consistent pattern, but she offered sufficient evidence to sustain the district court's findings.

Nor can defendants hope to disprove a discriminatory pattern by claiming that they chose outstanding male faculty members for promotion, for "affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion." *Alexander* v. *Louisiana,* 405 U.S. 625, 632 (1972). The scarcity

of women in the upper ranks accounts for their frequent lack of representation on the FEAC and the FAC. The racial or sexual composition of a body which makes subjective evaluations has often been considered a factor in employment discrimination cases. *See Stewart* v. *General Motors Corp.,* 542 F.2d 445 (7th Cir. 1976); *United States* v. *N.L. Industries,* 479 F.2d 354 (8th Cir. 1973).

In addition to statistical evidence, Dr. Sweeney presented testimony concerning other instances from which sex discrimination could be inferred.[20] An important part of her case centered around the ineffectiveness of Keene's affirmative action effort. Although a faculty committee drafted an affirmative action plan in 1973, no such plan was officially adopted until 1976. The current plan, in the form presented to the district court, does not even address the questions of salary and promotion. Moreover, the testimony reveals that the person who nominally served as affirmative action coordinator did virtually nothing to advance the rights of women on the Keene campus. He admitted as much in his own testimony.

Certainly the most striking evidence presented in this context concerned the affirmative action coordinator's response to Dr. Sweeney's filing of charges with the State Human Rights Commission. Not only did he attempt to get the plaintiff to answer the interrogatories sent to Keene by the Human Rights Commission, a measure which cannot be condoned, he also wrote to the president of Smith College for information on how that school had responded to a charge of sex discrimination because he was "concerned that that form of anarchy may creep north into our virgin territory."

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[20] Some parts of this evidence were less persuasive than others. For example, the references to women as "girls" in some personnel files and the existence of a distaff club open to faculty wives and female faculty members may be indicative of outdated thinking but would hardly, without more, prove a case.

Various witnesses also testified that in their opinion sex bias influenced promotion decisions at Keene. This bias may often be unconscious and unexpressed, but its potential for harm is greatest in reaching decisions on the basis of criteria which simply cannot be objectively measured or definitively stated.

From our careful review of all the evidence we conclude that the trial court's finding that sex discrimination impeded the plaintiff's second promotion effort was not clearly erroneous.

With regard to the court's finding against the plaintiff on the issue of salary discrimination, we likewise hold that the fact-findings were not clearly erroneous. Dr. Sweeney presented statistical evidence which demonstrated that the average salaries of women fell below those of men in each rank in almost every year. This evidence persuaded the district court that a pattern of sex discrimination in compensation existed. However, Dr. Sweeney did not offer any proof of what her salary would have been but for the discrimination. Nor did she explore deeply enough the various elements which influenced salary amounts so as to enable the district court to determine to what extent sex or other factors contributed to the amount of her compensation. From the record it is clear that merit, longevity, experience, and availability of funds all influenced the salary level. It is also certain that Keene State College has made no effort to standardize salary levels within a given rank or department. It is difficult to attribute a lower salary to any one factor in the absence of more particularized comparative evidence. Moreover, Dr. Sweeney's salary was lower than the female average, so the court could have inferred that her sex did not affect her pay.

Because we leave this fact-finding undisturbed, it is not necessary for us to reach the issue of whether the Equal Pay Act is applicable to this kind of case and whether it

can be constitutionally applied to a state college. *See National League of Cities* v. *Usery*, 426 U.S. 833 (1976).

Furthermore, in light of the fact-findings made by the district court, Dr. Sweeney would gain nothing from reversal of her § 1983 and Fourteenth Amendment claims or from a holding on the issue of whether Title IX creates an implied cause of action. Title VII suffices to make her whole to the extent she is entitled to relief. We express no opinion on these undecided issues.

We also affirm the award of attorneys' fees, costs, and expenses. The amount is reasonable in light of the factors set forth in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). The district court exercised its discretion properly in fixing the amount and in subtracting 20%. A party who prevails in part may still be awarded attorneys' fees. *Batiste* v. *Furnco Construction Corp.*, 503 F.2d 447 (7th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975).

The judgment is AFFIRMED.

CAMPBELL, *Circuit Judge* (Concurring). I agree with the result, but the tone of the court's opinion leaves me uneasy. By emphasizing the "importance" of the instant case and then dealing with such collateral questions as whether the intent requirement of *Washington* v. *Davis* applies to Title VII cases, and the duty of courts not to defer unduly to universities' personnel policies, an impression is generated that this circuit may endorse the use of a sword rather than a scalpel in cases of this delicate nature. In my view the instant case gives rise to no issue of first impression nor does it require taking a philosophical stance on the importance of women's rights *vis a vis*

those of a university administration. The question is mainly the traditional one of whether the district court's findings in a close case were clearly erroneous. As they were not, we properly affirm.

My reason for eschewing my brothers' more fulsome approach is my fear that it detracts from what I believe to be the central issue in all such cases as this — the need for the most objective, sensitive fact-finding humanly possible. Fact-finding biased in either direction can lead to socially harmful results: harm to the woman who is discriminated against without redress; harm, on the other hand, to a university and its students, and to more qualified applicants, if a lifetime job or promotion is conferred by the court upon a woman who would have been passed over had she been a male. All that a court says in the occasional sex-discrimination case that reaches it sets the pattern for myriad out-of-court dispositions. It behooves us to make clear that Title VII requires courts to be unflinching in upholding *both* the rights of the victims of sex discrimination *and* the right of universities and other employers to make sex blind discretionary decisions — even if a woman sometimes loses out. *See, e.g., Hochstadt* v. *Worcester Foundation for Experimental Biology*, 545 F.2d 222 (1st Cir. 1976).

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Civil Action No. 75-182

CHRISTINE M. SWEENEY

v.

BOARD OF TRUSTEES OF KEENE STATE COLLEGE, ET AL

OPINION

This is a sex discrimination case in which the plaintiff alleges that the defendants refused to promote her and have underpaid her because she is a woman.

The action was originally brought pursuant to:

a. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., (hereinafter "Title VII") providing for injunctive and other relief against discrimination in employment on the basis of race, religion, sex and national origin.

b. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, (hereinafter "Title IX") prohibiting sex discrimination in certain federally funded education programs.

c. Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.*, as amended by the Equal Pay Act of 1963, 29 U.S.C. § 206(d), providing for equal pay for men and women.

The pleadings were subsequently amended to add a count under 42 U.S.C. § 1983 and the Fourteenth Amendment to the United States Constitution.

I rule as a matter of law that neither Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 *et seq.*, nor the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.*, as amended by the Equal Pay Act of 1963, 29 U.S.C. § 206(d), are applicable to this action.

I find that there was no violation of the plaintiff's rights under 42 U.S.C. § 1983.

Although I can find no specific amendment to the pleadings, the plaintiff has suggested that there is a violation of 42 U.S.C. § 1985. I find and rule that there was no violation of 42 U.S.C. § 1985 and it is not applicable in this case.

Jurisdiction is pursuant to 42 U.S.C. § 2000e-5(f)(1)(A) (Title VII). I find that the plaintiff has complied with all of the procedural requirements of Title VII.

In order to prevail, the plaintiff must establish a *prima facie* case of discrimination. Once that it done, the burden shifts to the defendants to show a non-discriminatory motive. The burden then shifts back to the plaintiff to show that the rebuttal is pretextual. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804 (1973).

I now examine the testimony and the exhibits in the light of this test.

THE FACTS

The Parties

Plaintiff is a woman who has been employed by the defendants at Keene State College in the Department of Education as an associate professor from January 1, 1969, through July 1, 1976, and as a full professor from July 1, 1976, to date. The defendant Board of Trustees of the University of New Hampshire is the body which administers Keene State College and the University system of the State of New Hampshire. The defendant Keene State College is designated as a division of the University of New Hampshire. The defendant Leo F. Redfern is President of Keene State College. The defendant Clarence Davis was the Dean of Keene State College until April 23, 1975, when he resigned and resumed teaching. The defendant Richard A. Gustafson was the Acting Dean of the College as of April 23, 1975.

The plaintiff received a Bachelor of Education degree from Keene State College in 1943, a Master of Arts from Catholic University in 1956, and a Doctorate in Philosophy (Ph.D.) from Catholic University in 1962. All degrees were in the field of education. Between 1943 and 1956, she taught at the primary and secondary school levels. She taught graduate and undergraduate level courses from 1961 to 1965 at Catholic University and undergraduate courses at Emmanuel College, Boston, Massachusetts, from 1965 to 1968. She was promoted to the position of Associate Professor at Emmanuel College, effective July 1, 1968.

Plaintiff left Catholic University in 1965 to take a position at Emmanuel College. The reason for the change was that she had a home in Keene, New Hampshire, where she was raised and she wanted to get back to her native New England. While at Emmanuel, she taught and was Director of Student Teaching and was elected to Kappa Gamma, an honor society for women. She also was on a committee which worked with representatives of Wheelock and Simmons Colleges to establish a curriculum laboratory.

Plaintiff held no teaching position in the fall of 1968. She started at Keene State College in January of 1969 as an associate professor at a salary of $5,000 for the spring semester. The reason she left Emmanuel for Keene was to live again in her home town. She also received about one thousand dollars more a year in salary at Keene than she would have at Emmanuel.

When plaintiff started at Keene, she had an understanding with Dr. Paul Blacketor, Chairman of the Department of Education, that during the spring term her area of responsibility would be as Supervisor of Student Teaching and that, after that, she could select her own courses and concentrate on teaching.

From January of 1969 through the summer of 1971, the plaintiff performed her duties at the College competently

and without any untoward difficulties. She carried the same teaching load as males at her level and she was involved in at least the normal amount of committee work on the campus and extracurricular activities expected of an associate professor. She was well thought of by the Chairman and her colleagues in the Education department.

The English Trip

The first real snag in the plaintiff's career occurred in August of 1971 when the Dean of College advised Dr. Blacketor, plaintiff's department head, that he would not approve the plaintiff accompanying students on a foreign exchange visit to England. Since the "English Trip" matter looms large in this case, it is necessary to go into it in some detail.

An exchange student teachers' program had been instituted in 1970 between Keene and several English schools. Students from Keene went to England for a semester accompanied by a faculty advisor, and English students came to Keene. The program was a college credit course which had been developed by the Education Department. It was first limited to student teachers, but later expanded to other departments of the College. The coordinator of the program was Nancy Stuart, an assistant or associate professor in the English Department. A selection committee within the Department of Education selected faculty advisors for the trips from those who submitted applications. Two trips were taken in the spring of 1971, both under the aegis of male faculty advisors.

Plaintiff had been Chairperson of the Foreign Studies Committee the year before the exchange program was put into effect and was unanimously nominated in the spring of 1971 as faculty advisor for the first of two trips scheduled for that fall. Dr. Rousseau, a male, was recommended as an advisor for the second trip and a Mrs. Nelson was

named as an alternative in case either the plaintiff or Dr. Rousseau were unable to make the trip or in the event that a third trip could be scheduled. Anticipating that she would be spending the fall semester in England, the plaintiff taught during the summer session of 1971. She also made plans to go to England for a personal visit to relatives at the end of the summer session. On the last day of the summer term, Dr. Blacketor called her and informed her that the Dean of the College had not approved her nomination as Faculty Advisor for the fall trip to England, but had appointed Mrs. Nelson to go in her stead. He told her that no reasons had been given by Dean Davis for this action. Dean Davis adamantly refused to give his reasons to the plaintiff or any other faculty members who inquired of him except that he did state the reasons for his refusal to the President of the College at a much later date. There is no doubt that the Dean of the College had veto and final appointive power as to trip faculty advisors.

While this stubborn and unexplained refusal on the part of the Dean to articulate the reasons for refusing to allow the plaintiff to accompany student teachers to England does not rise to the level of a constitutional due process violation, it strongly suggests that his reasons were petty and personal. Vetoing the trip on which the plaintiff had planned at the very last minute was bad enough, but to refuse to explain such action was bound to cause resentment and anger on her part. The plaintiff, not unnaturally, felt that she was the victim of discrimination.

After learning of the Dean's action, the plaintiff made an appointment to see the President of the College, but he cancelled the appointment after he learned the purpose for it. The President felt that the plaintiff's problem was a matter to be resolved between her and the Dean of the College and that he, as President, should not get involved.

When the plaintiff resumed her teaching duties in the

fall of 1971, she sensed a different atmosphere in the Education Department. She was excluded from foreign student affairs and from the English exchange program. She feels that the English Trip veto had an adverse effect on her educational career and was the prime reason for her failure to get promoted. The plaintiff was the only member of the faculty who was vetoed by the Dean after a unanimous nomination by faculty colleagues.

Tenure

Dr. Blacketor, Chairman of plaintiff's department, recommended that she be given tenure and a salary increase effective July 1, 1972. Blacketor's letters of recommendation, Exhibits 42 and 43, can hardly be characterized as enthusiastic. He testified, in effect, that they were intentionally deprecatory because he felt that a strong recommendation would evoke opposition from Dean Davis. In any event, the plaintiff was unanimously recommended for tenure by the 1971-72 Faculty Evaluation Advisory Com-
tenure as of July 1, 1972. I take judicial notice of the fact that obtaining tenure is one of the most important steps in a teaching career because, for all practical purposes, it is a guarantee of employment at the institution where tenure has been granted.

Promotion

Before detailing the facts relative to plaintiff's attempts to attain the status of full professor, it is necessary to outline the collegial system of promotion in effect at Keene. The first step is a recommendation from the department chairman which is forwarded to the Dean of the College. He, in turn, sends it to the FEAC. This committee, which is independently elected, makes a study and evaluation of the record and qualifications of the applicant and then recmittee (FEAC). Dean Davis concurred and she was granted

ommends to the Dean either for or against promotion. The Dean, in turn, makes his recommendation to the Board of Trustees whose decision is final.

An appeal from an unfavorable decision starts with the chairman of the department, then goes to the Dean, and then to the Faculty Appeals Committee (FAC) (formerly Personnel Welfare Committee). The jurisdiction of this committee, whose members, like FEAC, are elected by the faculty, is limited to determining whether or not due process has been observed and whether or not new, relevant and significant evidence has emerged that would substantially effect the case. After FAC has made its determination, the case is then sent to the President of the College and, if called for, to the Board of Trustees.

The plaintiff was recommended for promotion to full Professor by the Department of Education and its Chairman, Dr. Blacketor, during the 1972-73 school year. Dr. Blacketor's memo supporting her promotion application was much more supportive than the ones given when she applied for tenure, but cannot be characterized as enthusiastic. Exhibit 4. FEAC, which was composed entirely of males, recommended 5 to 0 against promotion. No reasons were given to the plaintiff or to Dr. Blacketor for this decision. On March 26, 1973, Dean Davis advised the plaintiff that he concurred with FEAC's recommendation and offered to discuss the matter with her. Exhibit 5. The plaintiff met with the Dean on or about April 3, 1973. Dean Davis did not specifically recall the meeting, but did not deny that it took place. At the meeting, the Dean told the plaintiff that he did not know the reasons FEAC had recommended against promotion, but advised her that, if she wished to appeal, she should get letters of recommendation, which she did. Exhibit 7. At this meeting, the plaintiff took the opportunity to ask Dean Davis for the reasons he had refused her permission to go on the English

Trip. The only reply she got was that he did not have to give her the reasons.

On July 28, 1973, plaintiff appealed to FAC (then called Personnel Welfare Committee). No decision was rendered by FAC until March 19, 1974, at which time the committee issued a three and one-half page summary of what it had done and its recommendation. Exhibit 12. The salient points made by FAC are as follows. It met with two members of FEAC who had evaluated the plaintiff, but could get no reasons for the negative recommendation. It met with the plaintiff to get her side of the case and then met with Dean Davis. The question of the English Trip came up and the Dean made it clear to FAC that he reserved the right not to disclose the reasons for his veto either to FAC or the plaintiff. The English Trip was also discussed by FAC with Dr. Blacketor. By this time, there was a new Chairman of the Education Department, Dr. Walter St. John, and certain aspects of the plaintiff's case were discussed with him. Because of her pending appeal, the plaintiff had decided not to request promotion for the academic year 1973-74. FAC made the following recommendation.

> After due consideration of the various factors and information that has been brought to the attention of the *Faculty Appeals Committee* it is the recommendation of the *Committee* that the appellant be given consideration by this year's FEAC committee for possible promotion from Associate to Full Professor. The *Committee* feels that it was a mistake on the part of the appellant not to request consideration for promotion during the current academic year and that this mistake be remedied as it appears to have been made on the false premise that an appeal of a past decision by FEAC could not take place at the same time that a faculty member might be under current consideration

by a FEAC committee. The appellant's case is not at all clear cut. However, it is evident that the conflicting testimony in the "England matter" as well as the unwillingness of the Dean of the College to share either with the *Committee* or with the appellant the reasons she was not approved as a Faculty advisor to students going to England gives some modest substantiation to the appellant's claim that she was unfairly treated at least to the extent that it was unclear to the *Committee* why the appellant was dealt with in the way she was in this matter. Again, the *Committee* has no way of knowing to what extent such events may or may not have figured in last year's FEAC decision on her candidacy for promotion, as the *Committee* was not able to crack the secrecy barrier surrounding FEAC's decision and the basis upon which it was made. The *Committee* is inclined to give the appellant the benefit of the doubt to the extent that, although the *Committee* does not recommend that last year's FEAC decision be overturned, the *Committee* does strongly recommend that her candidacy for promotion be considered by this year's FEAC committee even if this means that she present herself for promotion to avoid going through the extensive visitation procedure required by her present Depart — [sic] Chairman. If the time limitation for promotional consideration can be waived on the basis of extenuating circumstances, and thereby allow for the visitation stipulations of the present Education Department chairman be met, the *Committee* would recommend that the appellant be given consideration as a candidate for promotion by this year's FEAC committee sometime later during the current Spring Semester. Whether the appellant would be willing to go ahead with a promotion candidacy under either of these provisions is unknown to

the *Committee* as the *Committee* has not discussed its recommendations with the appellant. Exhibit 12.

President Redfern, in a letter dated April 16, 1974, denied the request of FAC that the plaintiff be considered for a promotion in 1974. His reason was that FAC had exceeded its jurisdiction in making the recommendation since its only authority was to determine whether the decision of FEAC and the Dean was arbitrary and capricious.

At the trial, Dr. Smart, Chairman of the FEAC, who evaluated the plaintiff for promotion, testified that one of the reasons that she was turned down was the poor quality of her application. He stated that it was the worst one he had ever seen because it contained six grammatical errors and at least one dozen "typo" mistakes. He testified further that her record revealed "a total absence of anything positive for promotion, that there was a total lack of meritorious peformance and that her committee work was small and not campus wide." He also noted that she had not published.

In contrast, Sherman Lovering, an associate professor and director of the Testing Center and a member of FEAC in 1971-72, the year before plaintiff's promotion came up, testified that the plaintiff had all of the qualifications for promotion to full professor. He stated custom dictated that, if you had a Ph.D. and the requisite time in rank, promotion to a full professorship was automatic. He agreed with the FAC report and said that it was of great concern to him that plaintiff was not told of the reasons by FEAC for its negative recommendation and no explanation was given her for the Dean's refusal to allow her to go to England.

On April 29, 1974, plaintiff filed charges of discrimination with the New Hampshire Commission for Human Rights. Exhibits 51 and 52. It must be noted here that the plaintiff had not complained to anyone or any committee

on the campus that she felt that sex discrimination was the reason for the refusal to promote her. It was not until July 22, 1975, that she made a formal accusation of sex discrimination directly to the College. Exhibit 31. On May 21, 1974, however, she met with James Hobart, Director of Administration for the College, relative to a fourteen page questionnaire sent to him by the New Hampshire Commission for Human Rights. Exhibit 72. Her charges were, therefore, known to the administration in May of 1974.

On June 11, 1974, Professor Felton, Chairman of FAC, sent a memo to Hobart suggesting that the committee meet again to reconsider the appeal of the plaintiff because President Redfern's response to its report "brought out some additional conflicting testimony that the Committee was not aware of during its investigation of the case and, therefore, not included in the report of the Committee on the Sweeney case." Exhibit 15. Professor Felton sent this memo after he had "circularized the committee" advising them of plaintiff's complaint to the Human Rights Commission. Hobart did not reply to this memo.

Plaintiff was again considered for promotion during the 1974-75 academic year. A new FEAC committee, composed entirely of males, voted 5 to 0 against promotion. Dean Davis again concurred with the recommendation but, this time, stated the reasons.

> I have now reviewed your promotion situation and have consulted with FEAC after receiving their recommendation against the promotion.
>
> I am concurring with their advice. This decision is based upon the evaluation of FEAC which indicates that you have not fulfilled the qualifications as stated in the Faculty Manual; namely, that your teaching and research has not been "marked by the perspective of maturity and experience, or by some creative attribute generally recognizable in the academic world as a special asset to a faculty." Exhibit 19.

Plaintiff asked FEAC to reconsider, but it voted 5 to 0 against reconsideration.

In his testimony, Dr. Quirk, Chairman of this FEAC, stated that the plaintiff had an extremely weak case for promotion and that the committee found her deficient in teaching effectiveness, scholarly qualification, and contributions to the College.

Plaintiff appealed to FAC and supplied it with additional information and charged that she had been denied due process of law and was discriminated against because of her sex. Exhibits 30 and 31. FAC, which was chaired by Janet Grayson, sent a lengthy letter to Dr. Redfern stating that it was sympathetic to the plaintiff, that she had been subjected to unreasonable provocation because she was never given the reasons for the English Trip decision, and that the Dean was negligent for his failure to give plaintiff adequate reasons for the decisions against promotion. The letter further stated: "We are united in the view that the dean *must* give Dr. Sweeney reasons for denying her promotion." The letter concluded: "Although we did not find evidence to support her charge of discrimination because of sex, we are concerned that she had to endure unprofessional treatment within her department and by the administration." Exhibit 32.

The plaintiff was recommended for promotion again during the academic year 1975-76. This time, FEAC voted 5 to 0 in favor of promotion, effective July 1, 1976. The Chairman of this FEAC was Dr. Blacketor and one of the members was a woman. Professor Whybrew, who had replaced Professor Davis as Acting Dean of the College, approved the recommendation as did the Board of Trustees, and the plaintiff became a full professor on July 1, 1976.

Testimony of Dean Davis

While Dean Davis' refusal to give plaintiff the reasons for his veto of the English Trip was, in my opinion, a mistake and may be evidence of discrimination against the plaintiff for personal reasons, it is not evidence of sex discrimination. Not only was the replacement for the plaintiff a woman, but Dean Davis' unrebutted testimony was that, in making this decision, he relied on the advice of the coordinator of the program, Nancy Stuart, who was of the opinion that Mrs. Nelson had superior capabilities for establishing rapport and prestige with the English schools. A decision to replace one woman with another woman based on the advice of a third woman is hardly an indicia of discrimination against females. It is true that Dean Davis turned the plaintiff down twice for promotion, but on both occasions he was acting in accord with the unanimous recommendation of FEAC. He had previously approved the unanimous recommendation of FEAC that she be granted tenure. Whatever personal animus Dean Davis may have had against the plaintiff, there is no evidence that it was sex based.

The only evidence of sex bias on the part of Davis is his passive role in Keene's affirmative action program. He was not aware that, as Dean, he was the affirmative action officer for the faculty and he made no special effort to see to it that women took part in the promotion process.

Testimony of President Redfern

According to his testimony, President Redfern's role in the promotion process as President of the College is to serve passively in an appellate function. He determines whether or not the recommendation of FEAC and the Dean was made in conformance with good academic standards and whether or not the applicant was afforded due process.

In his memo of April 16, 1974, in reply to FAC's report, he noted that: "Actually, five years at the rank of associate professor is not deemed excessive by normal academic standards." Exhibit 14.

As President of the College, Redfern has the duty to see to it that the affirmative action plan is implemented. He plays a leadership role on the campus, preaches and cajoles in an effort to see to it that there is no discrimination. There was no evidence that Redfern made any specific efforts to upgrade or advance the status of women on campus in any way.

It was Redfern's opinion that the scattergram of salaries, Exhibit P, did not show any discrepancies between women and men. This opinion is contrary to Exhibits 67, 68 and 69 which show that males received higher avarage salaries than females in all the grades for the years, 1971-72, 72-73, 73-74, 74-75 and 75-76. The only exception was for associate professors in 1975-76, in which year the average salary of females was $15,864 and that of males, $15,419. In the years 1969-70 and 1970-71, the average salary of female professors was higher than that of males, but this was due to the fact that in those years there was only one female professor who had a great deal of longevity and whom everybody agrees was a superb teacher.

President Redfern testified that the College is now promoting women at the instruction level at a higher rate than men, but after that, the promotion rate favors men. This differential was explained on the grounds that, until recently, the faculty had a ratio of four or five males to one female. At the present time, four out of twelve department heads are women: foreign languages, home economics, physical education and music. There are two female full professors, Dr. Grayson and the plaintiff. The College has the only woman athletic director of a coeducational college, Dr. Sherry Bovinet. The evidence also shows that Dr. Bovinet had difficulty in obtaining a promotion to Associate Professor. Exhibit R.

Testimony of Norma Walker

Ms. Walker is an assistant professor at the College. She came to Keene in the summer of 1972 and teaches early childhood and reading courses. She has shared an office with the plaintiff since 1975 when the plaintiff took over as Director of the Reading Program. Her testimony was laudatory of the plaintiff as a professional colleague and as a person. She rebutted the charges that the plaintiff was rigid and had narrow views. Exhibit 48. The only part of her testimony bearing on sex discrimination was that the plaintiff carries a heavier teaching load than the male who also works in the reading department.

Testimony of Eleanor Vander Hagen

Professor Vander Hagen was one of the key witnesses for the plaintiff, although she explicitly stated that she made no judgment as to the plaintiff's case. Ms. Vander Hagen came to Keene in 1972. She is Assistant Professor in Sociology, Assistant to the President and Director of the Grant Program. In her opinion, the entire collegial process of promotion discriminates against women. The process, which she characterized as being run like an "old boys club," works best for those who get along with the power structure which, because of historical factors, is dominated by men. In her opinion, there is no awareness by men that they discriminate against women. As an example of different standards being applied, she said that Dr. Janet Grayson had far above average qualifications and it took her years to be promoted while, at the same time, men with inferior qualifications were being promoted perfunctorily. It was Professor Vander Hagen's opinion that the personal life of a woman is a factor in tenure and promotion while it is not for men. Vander Hagen pointed out that the student body at the College is 60% women and, for this reason, there should be more women full professors

since they perform an important function as "role models" for the female students.

Professor Vander Hagen testified that there are no channels at Keene for concern about sex discrimination and that the administration treats the affirmative action program as a burden. In her opinion, the administration fails to recognize that sex discrimination against female faculty members does exist at Keene.

On cross-examination, Professor Vander Hagen admitted, in effect, that Keene reflects the traditional societal bias against women. She feels that women are disadvantaged as a group because of social categories. She agreed that all colleges, except proprietary ones, use the collegial system for tenure and promotion. Professor Vander Hagen did state that some men could be educated to understand the problems of women.

Testimony of James Hobart

Mr. Hobart has been Director of Administration at the College since 1972, and Coordinator of the Affirmative Action Program since 1973. His duty as Coordinator of the Affirmative Action Program was to develop a plan for affirmative action. The College, however, never adopted a plan directed specifically to itself as a separate entity. In 1976, an action plan was adopted by the Trustees as part of a statewide university system plan. Exhibit 70. The main objective of this plan is to achieve faculty hiring goals for women and members of minority groups by 1981. The plan, however, has no specific provisions for promotion of women and minority groups. Nor does it have any specific provisions for equalization of salary vis-a-vis women and minority groups.

Hobart sees his role in the affirmative action program as that of providing information, monitoring complaints and arranging meetings. It was his opinion that he ought

not to make judgments as to whether or not there are actual instances of discrimination and that he should not actively support an individual who might have been discriminated against. The plaintiff was the only person to whom he supplied information relative to sex discrimination. After the plaintiff had filed her complaint with the New Hampshire Commission on Human Rights, Hobart made no effort to determine if the claim was valid.

At the present time, a study is being conducted to determine whether or not there are salary inequities due to sex. The salaries of the faculty are studied and analyzed according to rank and every year a report is sent to the American Association of University Professors which studies and analyzes the information on a sex basis.

In March of 1975, he read the reply of the President of Smith College to a finding by the Massachusetts Commission Against Discrimination that Smith discriminated against females. President Mendenhall's reply was an open letter sent to all alumni. Hobart, who had known the President personally, wrote to him. An excerpt from Hobart's letter is revealing.

> One of your alumnae, Mrs. Andrea Scranton, has forwarded to me your Smith College Letter called "Smith College's Reply to the Decision of the Massachusetts Commission Against Discrimination." It was excellent and almost completely descriptive of a situation we are involved in with the New Hampshire Commission on Human Rights, in which a female associate professor, denied promotion to full professor (twice), is appealing to higher authority on the basis of sexual discrimination. While we felt that we were on strong ground, both on data and from a collegial standpoint, the actions of the Massachusetts Commission leave me gaping and concerned that that form of anarchy may creep north into our virgin territory.

> I would appreciate it very much if, when your lawyer prepares his presentation to the full Commission and/or to the Superior Court of Hampshire County, a copy of that presentation could be forwarded to my office for possible plagiarism in our presentation in response to what we expect may well be an adverse decision by our own Human Rights Commission. Exhibit 64.

Instead of determining whether or not there was sex discrimination at Keene, Hobart was more interested in framing a response to an expected adverse decision by the New Hamphire Human Rights Commission.

Hobart was of the opinion that the salaries of men and women are roughly equivalent considering that longevity plays an important role in the salary scale. Under the system in effect since 1966, an individual seeking an increase in salary makes his/her request to the faculty committee which, in turn, makes its recommendation to the Dean.

Testimony of Richard Gustafson

Professor Gustafson is Dean of the College now and was Acting Dean in the spring of 1975. After he received plaintiff's application for a review of the negative FEAC decision, he held a meeting with its Chairman, Professor Quirk, and asked if the plaintiff had furnished any additional materials. Since she had not, he decided to let FEAC's recommendation stand.

Testimony of Harvey Harkness

Harvey Harkness has been Director of Teacher Education and Professional Standards for the State of New Hampshire since 1968. He has known the plaintiff since 1970 when she became a member of the Professional Standards Board. This Board is advisory on all matters relative

to the preparation and continuing education of all students. Harkness found the plaintiff extremely competent, faithful and diligent and testified that she carried out all her assignments successfully. She was not, in his opinion, rigid, inflexible or intolerant of the ideas of others, the reasons Dr. Redfern had noted were the major factors in denying plaintiff a promotion in 1975. Exhibit 48.

Testimony of Professor Felton

William S. Felton, Jr., is Professor of Sociology at Keene, and was Chairman of FAC for the academic year 1973-74. The action that the committee took has already been detailed. It was his opinion that the plaintiff possessed credentials that would place her in the top third of the full professors on the faculty at that time. He agreed that judgment factors, as well as credentials, are involved in the promotion process.

Testimony of Sherman Lovering

Mr. Lovering's testimony has already been outlined. He emphatically denied that the Redfern Memo, Exhibit 48, was an accurate characterization of the plaintiff.

Testimony of Professor Blacketor

As Chairman of the Education Department, Professor Blacketor recommended the plaintiff for promotion to full professor. It was his opinion that, on a scale of one to ten, the plaintiff would rate as eight. Dr. Blacketor testified that there is sex discrimination in hiring practices at Keene. He based this on an analysis of certain programs in which there are no women at all. He also felt that there is sex discrimination as to salaries. It was his opinion that there was some discrimination relative to promotion and that this was due to the employment pattern. He testified also that there was no discrimination at all as far as working conditions were concerned.

Testimony of Professor Lyman

Professor Kathleen Dunn Lyman of Simmons College was the Plaintiff's expert witness. Based on her resume, Exhibit 80, and her testimony, I found that she was qualified to testify as an expert witness as to sex discrimination on college faculties. Dr. Lyman had access to all of the pertinent exhibits prior to testifying.

She was of the opinion, based on an analysis of the plaintiff's personnel file and those of others who were promoted, that the plaintiff was qualified to be promoted to full professor in 1973. She testified in detail about the plaintiff in comparison with other faculty members, to wit: Lyle, Lovering, Hastings, Layman, Laurie, Mosley, Jones, Felton, Davis and Havill. In her opinion, the plaintiff rated "very good" in the area of scholarly activities, and others who were promoted had no better record in this regard, *e.g.*, Felton, Mosley and Havill.

It was Dr. Lyman's opinion that plaintiff's work on campus and outside committees was fully comparable to those men promoted ahead of her. She pointed out that Professor Lohman, who, in Dr. Lyman's opinion, had comparable qualifications to the plaintiff, was promoted ahead of her, although he did not obtain the rank of associate professor until after the plaintiff.

Dr. Lyman further testified as to the application of the standards of promotion relative to men and women. She noted that, despite the fact that Professor Janet Grayson was an academic superstar, it took her a year longer to get promoted than less qualified men. She pointed out that Professor Ernest Lohman went from assistant professor to full professor in four years, half the time it took Professor Grayson. Dr. Lyman discussed the case of Professor Dorothy MacMillan and stated that seven men with less tenure and who were not as well qualified were promoted ahead of her.

It was Dr. Lyman's opinion that there was a pattern of sex discrimination in hiring, the promotion process, and salary scale. She pointed out that the decision making process at Keene was all male and that this resulted in men being favored in the majority of cases.

According to Professor Lyman, the 1976 affirmative action plan was inadequate. One of its faults is the failure to focus on promotion within the ranks.

On cross-examination, it was brought out that it is not unusual in any college to be rejected on the first try for promotion. It was also adduced that Professor Anne Peters had been the highest paid full professor at Keene for several years. Exhibit 69. Dr. Lyman was confronted on cross-examination with the names of several males who had the same or better qualifications as the plaintiff and whose promotion took as long or longer than the plaintiff, *i.e.*, Mosley, Smart, Cunnirgham and Hilderbrand. It was also pointed ou that Professor Havill did not attain the rank of full professor until after Grayson, but got his Ph.D. sooner than she did and had more tenure than Grayson.

Testimony of James D. Smart

In addition to his testimony, *supra,* on the reason why the FEAC, of which he was Chairman, recommended against promotion of the plaintiff, Professor Smart testified that he taught a course in women's rights and that he was aware of women's issues. He further stated that tenure and promotion are not treated alike. They are two distinct processes with different criteria and, in his opinion, the promotion decision is easier to make than the one determining tenure. It must also be noted that the History Department, which he chairs, has seven men and no women.

Testimony of Professor Quirk

Professor Quirk was the last witness and his testimony has been largely covered since he was Chairman of FEAC in 1974-75. In addition to stating the reasons why he did not think the plaintiff was qualified to be promoted, he testified that, usually, the minimum time in rank for an associate professor before being eligible for promotion to full professorship is four years.

Specific Exhibits

Exhibit 58 is answers to plaintiff's interrogatories giving the numbers, sex and salary of the faculty of the defendant College from 1965 through 1966. My analysis of the figures, which does not include the Wheelock laboratory, the school library, student services auxilary enterprises or the administration, reveals the following.

In the academic year 1965-66, there were nine male full professors and one female, ten male associate professors and one female, four male assistant professors and five females, four male instructors and no females, and one female lecturer.

In 1966-67, there were eight male full professors and two females, nine male associate professors and one female, eleven male assistants and six females, three male instructors and three females, one male lecturer and two females.

The exhibit contained only blank sheets for the years 1967-68 and 1968-69.

In 1969-70, there were ten male full professors and one female, seventeen male associates and three females, twenty-eight male assistants and six females, seven male instructors and two females.

In 1970-71, there were fourteen male full professors and one female, twenty-three male associates and four females, thirty-eight male assistants and twelve females, five male instructors and three females.

In 1971-72, there were sixteen male full professors and two females, twenty-five male associates and two females, thirty-seven male assistants and eleven females, fourteen male instructors and four females.

In 1972-73, there were eighteen male full professors and one female, twenty-five male associates and three females, thirty-six male associates and ten females, ten male instructors and three females.

In 1973-74, there were twenty male full professors and one female, twenty-eight male associates and six females, thirty-eight male assistants and eight females, eleven male instructors and seven females.

In 1974-75, there were twenty-three male full professors and one female, thirty-two male associates and seven females, thirty-eight male assistants and five females, five male instructors and four females.

In 1975-76, there were twenty-three male full professors and two females, thirty-five male associates and six females, thirty-eight male assistants and seven females, three male instructors and three females.

I realize that these figures differ slightly from the figures given in defendant's answers to another set of interrogatories, Exhibit 59, but the difference is not significant. I may have miscounted the total number in one or two places. Both Exhibits 58 and 59 show a very marked disparity between the number of males and females in every rank except that of instructor. This certainly is evidence of sex discrimination in hiring and promotion.

An analysis of Exhibits 58, 59, 67, 68 and 69 shows that over the years, salaries have been weighted in favor of males over females. Professor Anne Peters is the sole exception to this. Part of this is undoubtedly due to the longevity factor which, in turn, is due to the fact that the number of males hired over the years has greatly exceeded that of females. Another factor that skews the salary

scale in favor of males is the fact that the defendant college has no objective salary standard and schedule. Under the system in effect, longevity and judgmental factors, which cannot be objectively determined, weigh heavily in determining the salary of individual members of the faculty. The salary of an individual faculty member, as well as his/her promotion, depends on the discretion and judgment of his/her superiors. While this is necessary in the promotion process, it should not play a large role in determining an individual's salary. Broad discretion inevitably leads to discrimination. *See particularly* Exhibit 77 relative to Ms. Goder in which the Personnel Welfare Committee stated:

> All the evidence available to the Committee supports the appeal of Ms. Goder and the statement of her chairman considering her past and present salary a "gross inequity." Ms. Goder appears to be the most qualified member of her department in terms of education, experience, and ability. She is in fact the only member of the department qualified to teach essential upper-division courses required of the new Music major. Her present salary is shockingly low.

Since, under the present system in effect at Keene, the ultimate decision on salary is largely determined by males, there is bound to be discrimination against females, especially if we give credence to the belief of Professors Vander Hagen and Lyman that most males have a built-in societal bias against females. The salary of an individual should depend as far as possible on longevity, rank and other objective criteria.

SPECIFIC FINDINGS

1. Dean Davis did not discriminate against the plaintiff by reason of her sex in refusing to approve her as a faculty advisor on the trip to England.

2. The evidence establishes a pattern of sex discrimination at Keene State College with regard to hiring, promotion and salary.

3. Those in charge of the affirmative action program have failed to act affirmatively on behalf of women with regard to hiring, promotion and salary.

4. Based on her qualifications, the length of time she had spent at the defendant College and her rapport with her colleagues, I find that the plaintiff would not have been promoted even if she were a male in the academic year 1972-73.

5. I find that, if she had been a male, plaintiff would have been promoted on her next attempt.

6. I find that it was not the fault of anyone in the administration or any department having to do with promotion that the plaintiff failed to apply for promotion in the academic year 1973-74.

7. I find that the reason the plaintiff was not promoted in the academic year 1974-75 was because of her sex.

8. The defendants have not rebutted the plaintiff's evidence that they did not discriminate against her by reason of her sex and have not proven that they had a non-discriminatory motive in failing to promote her in the academic year 1974-75.

9. I find that a double standard was applied for males and females in the promotion process. The evidence shows that there was and is a disproportionately small number of women in the high ranks of associate and full professors and particularly in the rank of full professor. This double standard also prevails in regard to hiring and salaries.

10. The defendants have not rebutted the plaintiff's evidence that they have discriminated against women generally in hiring, promotion and salary.

11. The affirmative action plan is inadequate, particularly in regard to promotion and salary.

12. The plaintiff has not proven that her salary as a full professor is less than that of other male professors with the same or similar qualifications and responsibilities.

13. The plaintiff has not proven that her salary as an associate professor was less than that of other male associate professors with the same qualifications and responsibilities.

WHEREFORE IT IS ORDERED that the plaintiff is entitled to a back dating of her promotion to July 1, 1975, with back pay as full Professor to that year at the salary scale that she would have started at in 1975 and reasonable attorney's fees and costs.

Plaintiff's counsel will submit within ten days a specification of reasonable attorney's fees and a bill of costs.

s/ HUGH H. BOWNES
United States District Judge

April 13, 1977

cc: JACK B. MIDDLETON, ESQ.
JOSEPH A. MILLIMET, ESQ.

APPENDIX C

42 U.S. CODE

SUBCHAPTER VI. — EQUAL EMPLOYMENT OPPORTUNITIES

§ 2000e. Definitions

For the purposes of this subchapter —

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or proceeding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

§ 2000e-2. Unlawful employment practices — Employer practices

(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§ 2000e-6. Civil Actions by the Attorney General — Complaint *

(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

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*This function now under Equal Employment Opportunity Commission. See §2000e-6(c).

Supreme Court, U. S.
FILED
AUG 1 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1792

BOARD OF TRUSTEES OF
KEENE STATE COLLEGE, ET AL.,
PETITIONERS,

v.

CHRISTINE M. SWEENEY,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The Opinion of the United States District Court for the District of New Hampshire is not officially reported, but is unofficially reported at 14 FEP Cases 1220 and appears in Appendix B of the Petition for a Writ of Certiorari.

The Opinion of the United States Court of Appeals for the First Circuit is officially reported at 569 F.2d 169 (1st Cir. 1978) and appears in Appendix A of the Petition for a Writ of Certiorari.[1]

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered on January 4, 1978. A Petition for Rehearing was denied on March 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether under Title VII of the 1964 Civil Rights Act, as amended (hereinafter Title VII), the plaintiff proved a prima facie case that she was discriminated against by the defendants because of her sex when she was not promoted from associate to full professor by showing both specific examples of sex discrimination involving the plaintiff and other females, such as the various efforts of the Affirmative Action Coordinator of the defendant College to deter the plaintiff in this action and overwhelming statistical evidence demonstrating that women, in general, are and have been discriminated against by the defendant College in regard to promotion, hiring and salary.

2. Assuming the plaintiff proved a prima facie case, whether the defendants rebutted the plaintiff's prima facie case.

Statute Involved

The federal statute involved here is Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e, *et seq.*, as amended by

[1] References to the pages in the appendices of the Petition for Certiorari appear as (A-), (B-), etc.

the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. Portions of the statutory provisions are set forth in Appendix C of the Petition for Writ of Certiorari.

Statement of the Case

Christine M. Sweeney (hereinafter the plaintiff) instituted her employment discrimination case on June 20, 1975, in the Federal District Court for the District of New Hampshire in which she alleged sex discrimination with regard to a failure to be promoted from associate to full professor and with regard to her pay. Defendants were the Board of Trustees of Keene State College, its President, a former Dean, and its then Dean.

The action, as amended, alleged violations of Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. §2000e, *et seq.*, Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, *et seq.*, Fair Labor Standards Act of 1938, 29 U.S.C. §201, *et seq.*, as amended by the Equal Pay Act of 1963, 29 U.S.C. §206(d), Fourteenth Amendment to the United States Constitution, and 42 U.S.C. §1983.

The District Court in its opinion dated April 13, 1977, held that Title VII had been violated but that Title IX and the Equal Pay Act were not applicable as a matter of law, and that the plaintiff's rights under 42 U.S.C. §1983 and the Fourteenth Amendment had not been violated. With regard to Title VII, the District Court found that the plaintiff had set forth a prima facie case of sex discrimination concerning denial of promotion in 1975, which, "The defendants have not rebutted. . . ." (Specific Finding #8, B-25). The Court said that the statistical evidence established a pattern of sex discrimination at Keene State College in hiring, promotion, and salary, and that the defendants failed to rebut that evidence as well.

There were additional Specific Findings that the Affirmative Action Plan was inadequate, particularly in the areas of promotion and salary, that the College utilized a double standard for males and females in the promotion process, and that, if the plaintiff had been a male, she would have been promoted on her second attempt at promotion in 1975.

The defendants appealed the District Court decision, and the plaintiff cross-appealed on various issues, but primarily on the issue of salary and the first denial of promotion in 1973. The Court of Appeals, in its decision of January 4, 1978, affirmed the District Court decision regarding the violation of Title VII but expressed "no opinion" on the District Court's ruling concerning Title IX, Equal Pay Act, 42 U.S.C. §1983, and the Fourteenth Amendment. (A-21). The Court of Appeals indicated that proof of discriminatory intent is critical in a disparate treatment case. However, it said that such evidence need not be "direct evidence," but rather can be circumstantial:

> " 'Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds. *Washington* v. *Davis*, 426 U.S. 202, 242 (1970).' " (A-10).

Following the rules concerning the allocation of burden of proof articulated in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), the Court of Appeals set forth the burden of proof in Title VII as follows:

> ". . . [A] plaintiff bears the initial burden of presenting evidence sufficient to establish a prima facie case of discrimination. The burden then shifts to the defendant to rebut the prima facie case by showing that a legitimate, nondiscriminatory reason accounted for its actions. If the rebuttal is successful, the plaintiff must show that the stated reason was a mere pretext for discrimination. The ultimate burden of persuasion on the issue of discrimination remains with the plaintiff, who must convince the court by a preponderance of the evidence that he or she has been the victim of discrimination." (A-14).

Taking issue with the defendants' position on the burden of proof, which they made before the District Court and the Court of Appeals as well as in their Petition for Certiorari, the Court of Appeals said:

> "What we reject is an effort by the defendants to elevate the quantum of proof to such a level that a litigant is necessarily doomed to failure." (A-10).

The Court of Appeals then cited *International Brotherhood of Teamsters* v. *United States, supra,* in support of plaintiff's use of specific instances of discrimination and statistics to make out a prima facie case, and quoted from the *Teamsters* case as follows:

> " 'We have repeatedly approved the use of statistical proof, where it reached proportions comparable to those in this case, to establish a prima facie case of racial discrimination in jury selection cases. . . . Statistics are equally competent in proving employment discrimination. (A-15).

The Court also approved of plaintiff's reliance upon inferential proof of discriminatory motive in a disparate treatment case. (A-16).

After determining that the plaintiff properly employed statistical evidence and individual instances of discrimination, the Court of Appeals then summarized the unrebutted statistical evidence as follows:

> "Dr. Sweeney clearly showed that she was a member of a protected class within Title VII, that she was qualified for promotion, that she was rejected, and that others of her qualifications were promoted. She went further and presented statistical evidence which supports an inference of sex bias in promotion decisions. Most persuasive of the statistics was the fact that only four women in the entire history of Keene State College have achieved the rank of full professor. There have never been more than two women professors in any given academic year and this has occurred in only two years since 1968. In all other years since 1968, only one woman occupied the top rank. In contrast, the number of male professors has gone from ten in 1969-70 to 23 in 1975-76. A similarly striking discrepancy exists in the rank of associate professor. There were only three female associates in 1969-70 and six in 1975-76, while the males in that rank numbered 17 in 1969-70 and 35 in 1975-76. While women represent approximately 20% of the faculty, a figure which compares fairly favorably with the percentage of women in the applicable labor pool, males held slightly more than 90% of the full professor slots in 1969-1970 and 92% in 1975-76. In fact, there have been

> more male professors than male instructors every year since 1969-70, despite the defendants' insistence that entry to the top rank is a significant achievement reserved for the excellent few." (A-16-17).

The Court then cited specific instances of discrimination:

> "In addition to statistical evidence, Dr. Sweeney presented testimony concerning other instances from which sex discrimination could be inferred. An important part of her case centered around the ineffectivness of Keene's affirmative action effort. Although a faculty committee drafted an affirmative action plan in 1973, no such plan was officially adopted until 1976. The current plan, in the form presented to the district court, does not even address the questions of salary and promotion. Moreover, the testimony reveals that the person who nominally served as affirmative action coordinator did virtually nothing to advance the rights of women on the Keene campus. He admitted as much in his own testimony.
>
> "Certainly the most striking evidence presented in this context concerned the affirmative action coordinator's response to Dr. Sweeney's filing of charges with the State Human Rights Commission. Not only did he attempt to get the plaintiff to answer the interrogatories sent to Keene by the Human Rights Commission, a measure which cannot be condoned, he also wrote to the president of Smith College for information on how that school had responded to a charge of sex discrimination because he was 'concerned that that form of anarchy may creep north into our virgin territory.'

"Various witnesses also testified that in their opinion sex bias influenced promotion decisions at Keene. This bias may often be unconscious and unexpressed, but its potential for harm is greatest in reaching decisions on the basis of criteria which simply cannot be objectively measured or definitively stated.

"From our careful review of all the evidence we conclude that the trial court's finding that sex discrimination impeded the plaintiff's second promotion effort was not clearly erroneous." (A-19-20).

Argument

CERTIORARI SHOULD BE DENIED BECAUSE NO NEW SIGNIFICANT LEGAL ISSUES HAVE BEEN RAISED BY THE OPINIONS OF THE COURTS BELOW AND BECAUSE THE DISTRICT COURT'S FINDINGS WERE NOT CLEARLY ERRONEOUS.

Judge Campbell, in his concurring opinion to the opinion of the Court of Appeals in this case, sets forth the principal reason why certiorari should not be granted:

> "In my view the instant case gives rise to no issue of first impression nor does it require taking a philosophical stance on the importance of women's rights *vis a vis* those of a university administration. The question is mainly the traditional one of whether the district court's findings in a close case were clearly erroneous. As they were not, we properly affirm." (A-21-22).

Because there is no conflict of law in the circuits on the legal issues in this case, nothing is to be gained by this Court's review of the case at hand. The nature of proof required for the plaintiff to establish a prima facie case of discrimination has been stated and restated, *Furnco Construction Corp.* v. *Waters*, — U.S. —, 46 U.S.L.W. 4966 (Decided June 29, 1978); *International Brotherhood of*

Teamsters v. *United States, supra; McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); plaintiff's ultimate burden is well settled, *King* v. *Yellow Freight System*, 523 F.2d 879 (8th Cir. 1975); *Naraine* v. *Western Electric Co.*, 507 F.2d 590 (8th Cir. 1974); and no reasonable dispute exists in connection with the perfectly permissible use of inferential proof in a disparate treatment case. *Muller* v. *U.S. Steel Corp.*, 509 F.2d 923 (10th Cir. 1975); *Marquez* v. *Omaha District Sales Office, Ford Division*, 440 F.2d 1157 (8th Cir. 1971); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970); *Blue Bell Boots, Inc.* v. *EEOC*, 418 F.2d 355 (6th Cir. 1969). The legal issues presented by the instant case consequently do not bear reexamination by this Court. Contrary to the position taken in this case by the defendants, it does not follow from the mere fact that previous defendant educational institutions have successfully weathered Title VII suits that the defendants should ultimately prevail here. Those cases were decided on factual conclusions that no discrimination existed and not, as defendants would have this Court believe, on the philosophical premise that the decision making processes of educational institutions are *a priori* exempt from judicial scrutiny. On the contrary, despite some reluctance of the courts to become intimately involved in the promotional processes of higher education, Title VII was clearly amended specifically to include colleges and universities. The Equal Employment Opportunity Act of 1972, 86 Stat. 103, §3 (1972). The evidence in this case demonstrates gross insensitivity to women on the part of Keene State College and its administrators. The logical conclusion of defendants' "hand-off" posture would be to permit the same sort of egregious discriminatory practices to continue on campuses across the land as exist at Keene State College—and to foster and perpetuate the very ills that Title VII was enacted to eradicate. This Court can-

not, as defendants wish, rewrite the statute to exclude academic institutions from Title VII.

Defendants also erroneously contend that in evaluating the number of women on the faculty, the trial court ignored the number of women in the applicable labor pool. The plaintiff's evidence provided an appropriate basis for the trial court's finding that the plaintiff should have been promoted in 1975 from associate to full professor, including evidence of the available labor market in each of the various academic disciplines at Keene State College. The evidence of intent to discriminate was substantial and included not only statistics but also specific examples of unlawful conduct; and most significantly from the standpoint of the rule set down by *McDonnell Douglas* and its progeny, the statistical data presented to the District Court by the plaintiff was uncontroverted by the defendants.

At the time the plaintiff was hired by Keene State College in January, 1969, her annualized salary, as an associate professor, was $10,0[illegible] The only associate professor making less than plaintiff was another female associate professor, Dr. Dorothy MacMillan, who was earning $9,800. At that time there were 17 male and 4 female associate professors. Other statistical evidence on the number of women in various academic ranks and the average salary of each is as follows:

TOTAL NUMBER OF ACADEMIC EMPLOYEES AT KEENE STATE COLLEGE

YEAR	INSTRUCTOR		ASSISTANT PROFESSOR		ASSOCIATE PROFESSOR		FULL PROFESSOR	
	F	*M*	*F*	*M*	*F*	*M*	*F*	*M*
1968-1969	10	10	5	29	4	17	1	10
1969-1970	11	14	8	35	4	15	1	13
1970-1971	14	13	10	35	4	23	2	15
1971-1972	13	15	9	39	3	23	1	17
1972-1973	17	16	11	40	3	25	1	18
1973-1974	14	9	5	34	6	26	1	19
1974-1975	14	9	7	40	9	34	1	22
1975-1976	11	5	13	42	8	36	2	24

AVERAGE SALARIES PER RANK FOR KSC FACULTY
1969-70 to 1975-1976

YEAR	INSTRUCTOR		ASSISTANT PROFESSOR		ASSOCIATE PROFESSOR		FULL PROFESSOR	
	F	*M*	*F*	*M*	*F*	*M*	*F*	*M*
1969-70	8,000	8,264	9,040	10,083	10,313	11,385	15,300	13,875
1970-71	8,600	9,183	9,625	10,016	11,225	12,177	16,400	14,735
1971-72	8,850	9,617	9,986	10,548	11,525	12,204	14,850	14,997
1972-73	8,900	9,777	10,320	10,782	11,767	12,604	13,900	15,575
1973-74	10,136	10,795	11,263	11,663	13,267	13,695	15,300	16,750
1974-75	11,514	12,178	12,175	13,098	14,839	15,084	16,700	17,941
1975-76	11,733	12,600	12,290	13,190	15,864	15,419	17,750	18,975

The plaintiff's salary as an Associate Professor for each year is *below* the average paid male associate professors:

SALARY OF CHRISTINE M. SWEENEY AT KEENE STATE COLLEGE

1 Semester —	1969	$ 5,000 (annualized $10,000)
	1969-1970	10,000
	1970-1971	10,300
	1971-1972	11,100
	1972-1973	11,500
	1973-1974	13,100
	1974-1975	14,400
	1975-1976	15,200

Although there are a substantial number of women teaching at Keene State College, few have ever succeeded in reaching the upper ranks. In fact, in the history of the College, there have been only four female full professors, one of whom is the plaintiff. Although males without a terminal degree have been promoted to full professor, no woman has been promoted to this rank without her doctorate. There also is a history at Keene State College for males being hired as full professors without having served in that rank in their previous employment while again women with equal, if not superior qualifications, have never been hired into the highest rank but rather forced to serve as associate professors and wait for promotion.

The history of hiring and promotion for the years 1972-74 is as follows:

APPOINTMENTS AND PROMOTIONS
KSC FACULTY INCLUDING WHEELOCK SCHOOL AND LIBRARY
FOR 1972-1974

	APPOINTMENTS			PROMOTIONS		
	1972	1973	1974	1972	1973	1974
Instructors:						
Male	5	0	1	–	–	–
Female	5	2	2	–	–	–
Assistant Professors:						
Male	1	1	0	3	1	6
Female	0	0	1	0	2	2
Associate Professors:						
Male	1	2	2	3	4	6
Female	0	0	0	0	3	3
Professors:						
Male	0	1	0	1	1	4
Female	0	0	0	0	0	0

Again, there is a complete absence of either promotions or appointments of females to the highest rank, while males appear in relatively large numbers.

The defendants' effort to rebut this statistical evidence relies heavily on one fact which they refer to on page five of their Petition, namely, five out of six women were promoted in 1975 (effective July 1, 1976) while only 12 out of 25 men were promoted or given tenure. The defendants fail to point out that in the five out of six promotions of females, none was to full professor.

Similarly, the defendants argue that 20 percent of the faculty is female and if 20 percent of the women are promoted regardless of rank, they have successfully rebutted plaintiff's prima facie case. In so arguing, the defendants in their brief do exactly what they have done in their Affirmative Action Program; they look at total number of females without seeing where females are located

in the various ranks and how much they are paid. This skirts the issue of why women fare so poorly in promotion, pay and hiring. Further, defendants have attempted to discredit the plaintiff's statistical analysis by relying upon certain language in *Hazelwood* v. *United States,* 433 U.S. 186 (1977), which was a case concerned with hiring and not, as is this case, with promotion and salary. In any event, the trial court *did* consider the relevant labor market in its statistical analysis; such evidence was clearly introduced as part of the defendant's Affirmative Action Plan, which set forth the available market in each of the various academic disciplines. (Ex. 70) Consequently, this evidence was before the District Court.

Defendants erroneously argue that the Court of Appeals has raised the level of proof required to dispel an adverse inference from a prima facie showing under *McDonnell Douglas.* By taking a portion of a finding of the District Court out of context, the defendants distort the actual findings of the District Court, specifically, Specific Finding #8:

> "8. The defendants have not rebutted the plaintiff's evidence that they did not discriminate against her by reason of her sex and have not proven that they had a non-discriminatory motive in failing to promote her in the academic year 1974-75." (B-25)

The defendants take the latter part of this finding and on page five of their Petition set it out in italics in an effort to suggest that the Court placed a higher burden on the defendants than is required by *McDonnell Douglas,* forcing them not merely to rebut an inference of discrimination, but must also prove a non-discriminatory motive. That is clearly not incumbent upon the defendants under the rule

established in *Furnco, supra; Teamsters, supra;* and *McDonnell Douglas, supra.* Furthermore, a careful and complete reading of the District Court and the Appeals Court decisions make certain that no greater burden was placed on the defendants than is incumbent upon them under *McDonnell Douglas.* The first part of Specific Finding #8 quoted above makes it clear that the District Court found that the defendants had not rebutted the plaintiff's prima facie case; the balance of the finding is merely surplusage and obviously not determinative of the situation. Likewise, the Court of Appeals, employing the correct test for dispelling the adverse inference to be drawn from a prima facie showing, concluded that the defendants had failed in their efforts to rebut the plaintiff's evidence:

> "The defendant attempted to rebut these statistics by pointing to highly qualified men who remained in the lower ranks longer than Dr. Sweeney. While this evidence is informative, the district court was not required to find that it totally dispelled the inference of discrimination created by the other statistics. Likewise, evidence of males who failed to be promoted on their first try does not necessarily rebut the inference of the plaintiff's more striking statistics. At best, these tales of individual males' struggles account for the district court's conclusion that Dr. Sweeney would not have achieved promotion in her first effort even if she had been a male. It is true that the defendants were able to find instances where an individual male of superior qualifications encountered difficulties in reaching the level of professor. But these examples were countered by other situations where females fared worse. In short, the plaintiff did not prove the existence of a completely consistent pattern, but she

> offered sufficient evidence to sustain the district court's findings.
>
> "Nor can defendants hope to disprove a discriminatory pattern by claiming that they chose outstanding male faculty members for promotion, for 'affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion.' *Alexander* v. *Louisiana,* 405 U.S. 625, 632 (1972). The scarcity of women in the upper ranks accounts for their frequent lack of representation on the FEAC and the FAC. The racial or sexual composition of a body which makes subjective evaluations has often been considered a factor in employment discrimination cases. See *Stewart* v. *General Motors Corp.,* 542 F.2d 445 (7th Cir. 1976); *United States* v. *N.L. Industries,* 479 F.2d 354 (8th Cir. 1973)."
> (A-18-19)

In summary, defendants' basic contentions are that:

1. Because all previous cases in the field of academic employment have resulted in findings for the school, this Court should reverse the plaintiff's victory so as to preserve a school's right to act in the area of promotion without regard to the clear statement of the law.
2. The Court of Appeals failed to apply the relevant labor pool analysis.
3. The Court of Appeals has added the requirement that the defendant must disprove a discriminatory pattern in order to rebut a plaintiff's prima facie case.

Taking these one at a time, it should be obvious that the mere fact that the College is unhappy with the result since it is the only school to lose a promotion case because of a

finding of sex discrimination, is not to state a reason at all. The legislative history set forth in the Court of Appeals decision is not only persuasive but leads inescapably to the conclusion that Congress intended colleges, such as the defendant, to be forbidden to discriminate against females in all phases of employment, including promotion. Consequently, the level of proof is controlled by *McDonnell Douglas,* and the scope of review is the same for academic employment cases as for other employment discrimination cases.

The defendants hoping to expand the rule in *Hazelwood,* allege that the District Court and Court of Appeals failed to consider the relevant labor pool. But this conclusion overlooks specific language in the decisions, as well as evidence in the record, namely, Plaintiff's Exhibit 70, the Affirmative Action Program, which did set forth the available market in each of the academic departments. As the Court of Appeals noted:

> "While women represent approximately 20% of the faculty, a figure which compares fairly favorably with the percentage of women in the applicable labor pool, males held slightly more than 90% of the full professor slots in 1969-1970 and 92% in 1975-76. In fact, there have been more male professors than male instructors every year since 1969-70, despite the defendants' insistence that entry to the top rank is a significant achievement reserved for the excellent few." (A-17).

The third element in the defendants' Petition is their claim that the Court put a heavier burden on them than required by *McDonnell Douglas* and *Teamsters* in disproving a pattern of discrimination which plaintiff proved to support her prima facie case. The defendants misread lines from the decisions of the District Court and Court of

Appeals which merely commented on the defendants' evidence and found that they failed in their effort to show there was not a pattern of discrimination. The defendants certainly tried to disprove such a pattern and the Courts found that they failed. This finding does not change the law or place a heavier burden on the defendants, but merely clarifies the point that the defendants failed to rebut the plaintiffs' circumstantial evidence of an intent to discriminate because of her sex. At no time do defendants cite actual language in the decisions which is incorrect as a matter of law.

The defendants are unhappy with the results of the case, not because of the legal findings in the decisions, but rather the findings of fact. The District Court found that they had violated Title VII in failing to promote Christine Sweeney and to support its findings used statistics and specific examples of sex discrimination introduced as evidence, including the evidence that a pattern of sex discrimination exists at the College. Those fact findings were not found to be clearly erroneous by the Court of Appeals and nothing has been stated in the Petition for Certiorari which should cause this Court to grant the Petition.

Conclusion

For the reasons stated above, the Petition for Certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1792

BOARD OF TRUSTEES OF
KEENE STATE COLLEGE, ET AL.,
PETITIONERS,

v.

CHRISTINE M. SWEENEY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I. INTRODUCTION

The respondent's Brief in Opposition urges this Court to conclude that the questions presented by the Petition for Certiorari are purely objections to findings of fact. The respondent thereby invites a repetition of the judicial error

below, namely, accepting her circumstantial evidence as valid conclusive proof of sex discrimination in an individual academic promotion case.

The treatment of proof below constituted *legal error.* Petitioners take issue with

(1) the competency of respondent's evidence to support the ultimate finding of sex discrimination, and
(2) the burden of proof under which they labored as defendants—which was to "prove absence of discriminatory motive" (A-15).

"Given the meandering course that Title VII adjudication has taken",[1] it is not surprising to find lower courts proceeding on erroneous theories based on pre-existing understandings about appropriate standards of proof.

The Brief in Opposition is composed largely of material transposed from the Court of Appeals' opinion and sets forth again the respondent's evidence. Therefore, petitioners are compelled now to address more specifically the competency and relevancy of the evidence, as well as to correct certain overstatements and errors of fact in respondent's brief.

II. Inferential Proof in a Disparate Treatment Case—Whether the Plaintiff's Evidence Can Sustain the Trial Court's Ultimate Finding of Discrimination

The Court of Appeals has stated that

> "... an individual plaintiff who alleges disparate treatment because of her sex must prove that her unfavorable treatment was *sexually premised.*" (A-14) (emphasis supplied)

The court further states that

> "... a plaintiff may rely upon inferential proof of discriminatory motive in a disparate treatment case." (A-16)

Clearly, however, an inference is only as valid as the evidence from which it is derived. Here the courts below erroneously accepted the plaintiff's evidence as valid, i.e., both relevant and meaningful to her individual case. This evidence consisted of

(1) "specific examples of sex discrimination involving the plaintiff and other females" (Brief in Opp. pp. 2, 7);
(2) statistical evidence (Brief in Opp., pp. 2, 6-7); and
(3) opinion testimony that societal bias influenced promotion decisions (Brief in Opp., p. 8).

When examined separately, each leg of the plaintiff's case is incomplete, or logically unrelated to an inference of *sex* discrimination in *her promotion*, and incapable of supporting the conclusive finding of a Title VII violation. Their sum is no stronger.

A. *Plaintiff's Specific Examples*

The specific examples involving the plaintiff herself include the "English Trip", which figures significantly in the opinions of both courts below (B-4-6, B-8-9, B-12-13; A-4-6); and the response of the college's affirmative action coordinator to the plaintiff's filing of charges with the

---

[1] Opinion concurring in the result, and concurring in part, filed by Mr. Justice Powell in *Nashville Gas Co.* v. *Satty*, ___ U.S. ___, 54 L.Ed.2d 356, 363, 98 S.Ct. ___ (1977).

State's human rights commission, which the Court of Appeals deemed the "most striking evidence presented in this context" (i.e., specific instances). (A-19)

With respect to the "English Trip", both courts below specifically stated that the dean's (Dean Davis) decision was *not* an example of sex discrimination. (B-13, 24; A-4-5) Moreover, the trial court stated:

> "It is true that Dean Davis turned the plaintiff down twice for promotion, but on both occasions he was acting in accord with the unanimous recommendation of FEAC. He had previously approved the unanimous recommendation of FEAC that she be granted tenure. Whatever personal animus Dean Davis may have had against the plaintiff, there is *no evidence that it was sex biased.*" (B-13) (emphasis supplied)

The Court of Appeals mentions the "English Trip" because, it says, "the incident plays a role in later developments." (A-5) Indeed, the plaintiff kept the incident alive because she believed she had been discriminated against and that the trip veto "was the prime reason for her failure to get promoted." (B-5-6, 7-9) In 1975, some four years later, the plaintiff raised the "English Trip" in the appeal of her promotion failure during the 1974-75 academic year. This was the year the trial court concluded the plaintiff should have been promoted. (B-25) The chairperson of the investigating faculty committee, Dr. Janet Grayson, reported on plaintiff's complaints in her letter to the president, and concluded:

> "*Although we did not find evidence to support her charge of discrimination because of sex,* we are concerned that she had to endure unprofessional treatment within her department and by the administration." (B-12) (emphasis supplied)

Any effect the "English Trip" may have had on her promotion attempts cannot be attributed to sex discrimination if the incident did not arise from sex discrimination initially. The investigating faculty committee did not think the dean's actions were sexually premised—either the trip veto or the promotion decisions. The trial court did not think so either. (B-13) Therefore, the court's inference of discrimination in promotion in 1974-75 cannot logically rest on the "English Trip", or the dean's concurrence with the faculty evaluation committee's negative recommendation.

The other specific example involving the plaintiff concerned the college's director of administration, who had also been designated as the campus affirmative action coordinator.[2] (Brief in Opp., p. 7; A-19) But, any inference drawn from this administrator's actions is totally irrelevant to a conclusion of sex discrimination in faculty promotion since he played no part in the promotion process. He was not a member of the faculty. No evidence indicated that he served in a policy making role of any kind nor in any way influenced faculty promotion decisions. The courts below erred in making this evidence inferential support for plaintiff's allegation of sex discrimination in her promotion.

B. *Affirmative Action Efforts*

Both the trial court and the Court of Appeals erroneously inferred proof of sex discrimination against the plaintiff from criticism of the college's affirmative action plan. Respondent's brief quotes the Court of Appeals' opinion and points up this error:

---

[2] The college is part of a state university system. The same Board of Trustees governs all the divisions of the system (A-2, n.1) and, as a matter of policy, is committed to affirmative action. A system-wide affirmative action plan was adopted for all divisions, including Keene, in 1976. (B-16)

"An important part of her case centered around the ineffectiveness of Keene's affirmative action effort. . . . The current plan, in the form presented to the district court, does not even address the questions of salary and promotion." (Brief in Opp., p. 7, quoting court's opinion, at A-19)

The trial court also relied heavily on this evidence to infer sex discrimination against the plaintiff. It specifically found:

"3. Those in charge of the affirmative action program have failed to act affirmatively on behalf of women with regard to hiring, promotion and salary." (B-25)

"11. The affirmative action plan is inadequate, particularly in regard to promotion and salary." (B-25)

In the body of its opinion, the trial court comments on the testimony of Dean Davis and President Redfern (two of the named defendants) and reveals how it (improperly) inferred from such generalized observations proof of sex discrimination against the plaintiff:

"The only evidence of sex bias on the part of Davis is his passive role in Keene's affirmative action program. . . . [H]e made *no special effort* to see to it that women took part in the promotion process." (B-13) (emphasis supplied)

and

"As President of the College, Redfern has the duty to see to it that the affirmative action plan is implemented. . . . There is no evidence that Redfern made any *specific efforts* to upgrade or advance the status of women on campus in any way." (B-14) (emphasis supplied)

Further references by the trial court at pages B-16 through 18 and B-21 indicate the extent to which the lower court believed this evidence constituted proof of pervasive sex discrimination.

However, as a matter of law, no requirement exists for an affirmative action plan under Title VII, the basis for the courts' jurisdiction. (B-2) *Long* v. *Ford Motor Company*, 496 F.2d 500, 505 (6th Cir. 1974); *Walthall* v. *Blue Shield of California*, — F. Supp. —, 12 FEP Cases 933, 936 (N.D. Ca. 1976).

No evidence was introduced that Keene State College was even required to have an affirmative action plan, nor did the plaintiff allege violations of Executive Order No. 11246 which imposes affirmative action obligations on government contractors. (41 CFR §60-2.1 *et seq.*, Revised Order No. 4) Moreover, even if the college were required to have had an affirmative action plan, it was inappropriate for the courts to evaluate the plan before it was reviewed by the agency with that responsibility.[3] (41 CFR §60-2.2) Pertinent federal regulations (41 CFR §60-2.10 - 2.14) contain no references to promotion and salary as required considerations in affirmative action plans, yet the courts below erroneously concluded that the plan was inadequate in these respects. (Specific Finding #11, B-25; A-19) Ironically, the courts below viewed the college's voluntary affirmative action efforts as evidence of intent to discriminate. This constitutes legal error.

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[3] *Cf.*, *Cannon* v. *University of Chicago*, on doctrine of primary jurisdiction and exhaustion of administrative agency process, 406 F.Supp. 1257, at 1260 (D.C. Ill. 1976); *aff'd* 559 F.2d 1063 (7th Cir. 1976), *aff'd on rehearing*, 559 F.2d 1077 (1977), *cert. granted on other grounds*, 46 U.S.L.W. 3803 (12/28/77).

C. Statistical Evidence

Respondent contends that she presented "overwhelming statistical evidence demonstrating that women, in general, are and have been discriminated against . . .". (Brief in Opp., p. 2) Respondent asserts "the statistical data . . . was uncontroverted by the defendants." (Brief in Opp., p. 10) The data, however, were never the subject of controversy; the numbers were furnished from the college's records. Rather, the twofold controversy continues to be

(1) the probative force to which the statistical evidence is entitled *in the context of this case*; and
(2) whether defendants are obligated to "totally dispel the inference of discrimination created by the . . . [plaintiff's] statistics." (A-18) (See discussion, *infra,* of defendant's burden.)

Respondent quotes the Court of Appeals citing *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324 (1977) concerning the competency of statistical proof (Brief in Opp., p. 5) but omits this Court's caution that

> ". . . statistics are not irrefutable. . . . In short, *their usefulness depends on all of the surrounding facts and circumstances.* See, *e.g., Hester* v. *Southern R. Co.,* 497 F.2d 1374, 1379-1381 [(5th Cir. 1974)]," 431 U.S., at 340 (emphasis supplied)

In *Hester,* the Fifth Circuit held that general population figures could not be used to determine the availability of typists capable of typing 60 words per minute.

Similarly, numbers of men and women serving in, and promoted to, various academic ranks is meaningless without comparison to some applicable labor pool. Respondent's brief stated that

> "[d]efendants erroneously contend that . . . the trial court ignored the number of women in the applicable labor pool" (Brief in Opp., p. 10)

and

> "the trial court *did* consider the relevant labor market in its statistical analysis". (Brief in Opp., p. 13)

This is not supported by the record. The District Court's analysis (B-22-23) fails even to mention the concept of relevant labor market or applicable labor pool and deals solely with "a very marked disparity between the number of males and females . . .". (B-23). The respondent says that her "evidence provided an appropriate basis for the trial court's finding" (Brief in Opp., p. 10) and then proceeds in the following paragraphs, at pages 10-13, to invite erroneous conclusions from this Court by presenting raw numbers, irrelevant salary data concerning herself, data without context, and misleading and mistaken statements of fact, including but not limited to:

(1) Table of absolute numbers which obscures the relevant labor market in each of the various academic disciplines.
(2) Table of average salaries which obscures factors of merit and longevity, and whose averages are drawn in many instances from populations as small as 1 to 5.
(3) Statement that men were often hired as full professors without having previously served in that rank whereas women with equal qualifications were forced to serve as associate professors and wait for promotions. The plaintiff presented the case of *only one* woman about whom this inference could possibly be drawn. The brief fails to

mention the favorable treatment of the *plaintiff who herself was hired as an associate professor without ever having served in that rank.*

(4) Table of appointments and promotions which omits applicant/candidate data; *e.g.*, in 1974, 3 women applied for promotion to associate professor and all were successful; no women were promoted to full professor, but none were candidates.

(5) Statement that defendants fail to point out that of the five of six women promoted in 1975, none was promoted to full professor. This statement simply is not true because in that year Dr. Janet Grayson was promoted to full professor.

This Court has already considered the competency of statistical evidence in *Teamsters, supra, Hazelwood* v. *United States,* 433 U.S. 299 (1977), and *Mayor of Philadelphia* v. *Educational Equality League,* 415 U.S. 605, 620-621 (1974), among others. Similarly, it is appropriate for petitioners to seek this Court's consideration of statistics in this employment setting.

D. *Societal Bias*

In the final analysis, after the specific examples and statistical evidence are examined discerningly, what remains are vague generalizations about societal bias. The courts below weighed this factor heavily but failed to note the absence of its manifestation in the faculty committees making promotion and tenure recommendations. Respondent's brief quotes, at page 8, the Court of Appeals' statement:

> "This bias may often be unconscious and unexpressed, but its potential for harm is greatest in reaching decisions on the basis of criteria which simply cannot be objectively measured or definitely stated." (A-20)

The significance the trial court attributed to societal bias is shown by statements throughout its opinion. Summarizing the testimony of "one of the key witnesses for the plaintiff", the lower court said:

> "In her opinion, there is no awareness by men that they discriminate against women." (B-15)

and

> ". . . Professor Vander Hagen admitted, in effect, that Keene reflects the traditional societal bias against women. She feels that women are disadvantaged as a group because of social categories. . . . Professor Vander Hagen did state that some men could be educated to understand the problems of women." (B-16)

The trial court said about the testimony of the woman who was the plaintiff's expert witness:

> "She pointed out that the decision making process at Keene was all male and that this resulted in men being favored in the majority of cases." (B-21)

And, in its salary analysis, the court concluded that:

> "Since under the present system . . . , the ultimate decision on salary is largely determined by males, *there is bound to be discrimination against females,* especially if we give credence to the belief of Professors Vander Hagen and Lyman that most males have a built-in societal bias against females." (B-24) (emphasis supplied)

These judicial observations fail to distinguish, however, between attitude and action. Title VII does not proscribe

societal bias. Title VII addresses itself to practices. The courts below lost sight of the individual plaintiff's obligation to show a nexus—i.e., to show that male societal bias, in fact, impeded her career. The courts' generalized presumption that male decision makers are bound to discriminate against women was not borne out by the facts in plaintiff's own case.

To the contrary, defendants presented evidence that the plaintiff was treated as well as, and in some cases, *more* favorably than others, including men, at the college.

The following sample illustrates:

(1) Plaintiff was hired at a higher rank than she had ever filled. She had been an assistant professor at Emmanuel College for only two years before coming to Keene. Though she had been promoted to associate professor at Emmanuel, she never served in that rank. Keene's requirement for time in grade as assistant professor was four years, and men as well as women were routinely turned down for promotion to associate professor because of failure to satisfy this requirement.

(2) Plaintiff was given tenure, or permanent status, at the earliest possible date. Tenure is the single most important decision made about any professor at an American college.

(3) In her rate of progress from assistant to associate to full professor, the plaintiff fared better than most men at Keene. Because of the college's time in grade requirements, the *minimum* time from assistant to full professor was 8 years. The plaintiff attained full professor rank in 9½ years of service. Though some served fewer years as associate professor (and some served longer), only the very exceptional bettered her overall rate. No one testified that the plaintiff was outstanding.

The faculty committee in 1974-75 gave plaintiff a negative recommendation for legitimate reasons. No evidence —other than that the committee members were all male— was introduced to support an inference that this committee's action was sexually premised. The underlying assumptions about male attitudes and behavior accepted by the courts below placed the defendants in the position of having to prove that societal bias did not exist at the college. This was legal error.

III. Rebuttal in an Individual Disparate Treatment Case —Whether Defendants Were Obligated To Prove Absence of Motive and To Totally Dispel the Inference Created by Circumstantial Evidence

The trial court, in Finding #8 (B-25), apparently imposed on defendants the burden of proving a nondiscriminatory motive. Respondent's brief concedes that this is not the defendants' burden, and argues that the Court of Appeals stated the correct rule, namely, that defendants must totally dispel the inference created by plaintiff's statistics. (Brief in Opp., pp. 13-14) In fact, the Court of Appeals compounded the trial court's error. The Court of Appeals stated that

> ". . . in requiring the defendant *to prove absence of discriminatory motive,* the Supreme Court placed the burden squarely on the party with the greater access to such evidence." (A-15) (emphasis added)

Further the court said:

> "The defendant attempted to rebut these statistics by pointing to highly qualified men who remained in the lower ranks longer than Dr. Sweeney. While this evidence is informative, the district court was not

> required to find that it *totally dispelled the inference of discrimination created by the other statistics.*" (A-18) (emphasis supplied)

Instead of recognizing that plaintiff's promotion to full professor as rapidly as highly qualified men at Keene dispelled the basis for the ultimate finding of fact (that plaintiff was discriminated against because of her sex), the Court of Appeals affirmed the trial court's reliance on inference based on generalities, and required the defendants to "totally dispel" the inference of discrimination.

But, this Court's rule in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802 (1973), "to articulate some legitimate, non-discriminatory reason", does not require defendants to totally dispel inferences about class discrimination drawn from plaintiff's indirect evidence. The courts below applied erroneous standards to defendants' evidence.

Respondent's brief asserts that burden of proof issues in discrimination cases are well settled, citing the case of *Furnco Construction Corp.* v. *Waters,* recently decided by this Court, — U.S. —, 46 U.S.L.W. 4966 (June 29, 1978). (Brief in Opp., pp. 8-9) Instead of supporting respondent's assertion, the *Furnco* case illustrates exactly the type of legal error committed by the courts below in the instant case.

In *Furnco,* this Court reversed and remanded because the Court of Appeals confused proof of a *prima facie* showing with an ultimate finding of discrimination:

> "We think the Court of Appeals went awry, however, in apparently equating a prima facie showing . . . with an ultimate finding of fact . . . . . The Court of Appeals, as we read its opinion, thought Furnco's hiring procedures . . . must be the method which allows the employer to consider the qualifications of the largest number of minority applicants." 46 U.S.L.W., at 4969.[4]

[4] See discussion of affirmative action efforts, *supra.*

So in the present case, the courts below have gone awry by requiring the defendants to dispel plaintiff's prima facie case by meeting it on its own terms, i.e., by introducing more impressive statistics to refute generalized inferences. But, this is not a "pattern or practice" case, or a class action. So long as defendants' evidence indicates the plaintiff herself was not discriminated against by reason of her sex, a generalized inference of discrimination against women cannot establish the ultimate finding required in an individual disparate treatment case. Or, in the language of *Furnco,* the prima facie case which raises the inference of class discrimination does not equate to the ultimate finding of discrimination against the individual.

IV. Conclusion

Respondent's brief asserts that petitioners believe "the decision making processes of educational institutions are *a priori* exempt from judicial scrutiny." (Brief in Opp., p. 9) This distorts petitioners' position. This Court has already applied Title VII to varying factual situations and employment settings. Petitioners seek clarification for the academic employer whose decision making processes, such as reliance on faculty peer evaluation, are different from those policies and practices followed in business and industry.

This case does present important legal questions concerning judicial assumptions and treatment of proof. The Petition for Certiorari should be granted.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1792

BOARD OF TRUSTEES OF
KEENE STATE COLLEGE, ET AL.,
Petitioners,

v.

CHRISTINE M. SWEENEY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF THE AMERICAN COUNCIL ON EDUCATION AS AMICUS CURIAE IN SUPPORT OF PETITION

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MOTION FOR PERMISSION TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION

Pursuant to Rule 42 of the Rules of the Supreme Court of the United States (rev. 1971), the American Council on Education respectfully moves this Court for permission to file a brief *amicus curiae* in support of the petition for a writ of certiorari in No. 77-1792, and conditionally files the following brief.

The American Council on Education is a nonprofit corporation organized under the laws of, and located in, the District of Columbia. Founded in 1918, the Council is a membership organization composed of 1,291 nonprofit institutions of higher education from both the public and private sectors and 169 educational associations and organizations. Its work is financed by membership dues and by grants from foundations and learned and professional societies.

The Council is the nation's major coordinating body in postsecondary education. As an organization whose members include the overwhelming majority of nonprofit four-year colleges and universities, it is uniquely able to represent the interests of higher education generally on matters of national importance. The Council believes that one of the legal questions presented in this case is of critical importance to American colleges and universities, namely what is the appropriate scope of review by the judiciary of peer review decisions in academic employment cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*

The Council takes no position with respect to the allegations of discrimination on the basis of sex in this case, and has no interest in the disposition of the case insofar as the individual respondent is concerned. Rather, its concern is for maintenance of the independence and integrity of the academic enterprise. That independence and

integrity, on which the survival of our political system depends, is gravely threatened by judicial decisions such as that of the court below in this case.

Granting of this motion will ensure that the Court views this case in its proper perspective, as a case involving vital national interests that transcend the dispute over whether or not Christine Sweeney was unlawfully denied promotion by Keene State College because of her sex. Whether or not a court should substitute its judgment of an individual's academic qualifications or performance for that of duly-constitute peer review bodies is certainly a question worthy of the Court's attention.

For the foregoing reasons, the American Council on Education respectfully requests that its motion for permission to file a brief *amicus curiae* in support of the petition for a writ of certiorari to the United States Court of Appeals for the First Circuit be granted, and conditionally files the following brief.

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IN THE

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OCTOBER TERM, 1978

No. 77-1792

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ON PETITION FOR A WRIT OF CERTIORARI TO
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BRIEF OF THE AMERICAN COUNCIL ON EDUCATION AS AMICUS CURIAE IN SUPPORT OF PETITION

Interest of Amicus

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Question Presented

The sole question addressed by *amicus* in its brief is the scope of review by the judiciary of peer review decisions in academic employment cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*

A Writ of Certiorari Should Be Granted in Order To Determine the Scope of Review by the Judiciary of Peer Review Decisions in Academic Employment Cases Under Title VII

At most American colleges and universities, decisions or effective recommendations concerning faculty employment matters, such as hiring, promotion, and the award of tenure, are made by committees comprised of a faculty member's peers, who are uniquely able to make judgments concerning his or her academic qualifications and performance.[1] Such delegation of authority by an institution's governing board and chief administrative officers renders institutions of higher education unique among employers covered by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*[2]

Although this Court has not yet undertaken to decide a faculty employment case under Title VII, several such cases have been decided by the lower federal courts. The decision of the court below in this case is not consistent with the decisions of the other courts that have ruled concerning the scope of review by the judiciary of academic peer review judgments. A writ of certiorari should therefore be granted in order to resolve the resulting conflict among the circuits and to dispel the uncertainty which this maverick decision has created.

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[1] Keast, *Faculty Tenure: A Report and Recommendations by the Commission on Academic Tenure in Higher Education* (San Francisco: Jossey-Bass, 1973), p. 24.

[2] The extent to which the decisionmaking process concerning employment matters differs between the academic world and the world of business and industry was dramatically illustrated in a recent decision of the Second Circuit holding that faculty members who participate in a collegial system of academic governance are "managerial personnel" rather than "employees" within the meaning of the National Labor Relations Act, 29 U.S.C. §§151 *et seq.* and therefore have no right to engage in protected, concerted activity under that Act. *NLRB v. Yeshiva University*, Civ. No. 77-4182 (2d Cir. July 31, 1978).

A. *The scope of review used by the court below represents a radical departure from the scope of review used by other courts in academic employment cases under Title VII:*

Title VII of the Civil Rights Act of 1964 provides in section 703, 42 U.S.C., §2000e-2, as follows:

> (a) It shall be an unlawful employment practice for an employer
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to this compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

In 1972, Title VII was amended to cover the employment practices of educational institutions for the first time, effective March 24, 1972.[3]

Prior to extension of Title VII to cover educational institutions, cases alleging violation of the civil rights of employees at state institutions of higher education had arisen under the Civil Rights Act of 1871, 42 U.S.C. §1983. In such cases, the principle that a court should not substitute its judgment of an individual's academic qualifications or performance for that of duly-constituted academic bodies was well-established. *Green v. Board of Regents, Texas Tech University*, 474 F. 2d 594 (5th Cir.

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[3] Equal Employment Opportunity Act of 1972, P.L. 92-261, 86 Stat. 103 (1972), *amending* Civil Rights Act of 1964, P.L. 88-352, 78 Stat. 253 (1964), 42 U.S.C. §§2000e *et seq.*

1973); *McConnell v. Anderson;* 451 F. 2d 193 (8th Cir. 1971), *cert. denied* 405 U.S. 1046 (1972). In *McConnell,* the court stated (at 195):

> That a court is, in reviewing a determination of an administrative body, limited to deciding whether the administrative action was arbitrary, unreasonable or capricious long has been settled. This particularly must be so, it seems to us, where, as here, the determination under challenge is one falling within the considerable discretion entrusted those charged with the heavy responsibility of supervising the administration of this nation's colleges and universities.

A similar approach of judicial restraint has been adopted in cases arising under Title VII. The first, and still the leading, decision of a circuit court is *Faro v. New York University,* 502 F. 2d 1229, 1231 (2d Cir. 1974), where the court made the following oft-quoted statement:

> Of all fields which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision. Dr. Faro would remove any subjective judgments by her faculty colleagues in the decision-making process by having the courts examine "the university's recruitment, compensation, promotion and termination [procedures] and by analyzing the way these procedures are applied to the claimant personally." All this information she would obtain "through extensive discovery, either by the EEOC or the litigant herself." This argument might well lend itself to a *reductio ad absurdum* rebuttal. Such a procedure, in effect, would require a faculty committee charged with recommending or withholding advancements or tenure appointments to subject itself to a court inquiry at the behest of unsuccessful and disgruntled candidates as to why the unsuccessful was not as well qualified as the successful. This decision would then be passed on by a Court of Appeals or even the Supreme Court. The process might be simplified by a legislative enactment that no faculty appointment or advancement could be made without the committee obtaining a declaratory judgment naming the successful candidate after notice to all contending candidates to present their credentials for court inspection and decision.

In *Keyes v. Lenoir Rhyne College,* 552 F. 2d 579 at n. 6 (4th Cir. 1977), *cert. denied,* 46 U.S.L.W. 3258 (1977), the court expressed relief that, because the college had been able to demonstrate that any disparity in salary between males and females was based upon legitimate and nondiscriminatory factors, it was not necessary for the court to review individual evaluations: "Such evaluations are necessarily judgmental, and had the college seen fit to rely upon them we would be faced with the delicate question of whether the court should 'substitute its judgment for the rational and well-considered judgment of those possessing expertise in the field.' [citations to *Green* and *Faro* omitted]."

The federal district courts, to which fall the onerous task of fact-finding in these cases, have been uniform in refusing to overturn the judgments of peer review committees in faculty cases. See *Presseisen v. Swarthmore College,* 442 F. Supp. 593 (E.D. Pa. 1977); *Johnson v. University of Pittsburgh,* 435 F. Supp. 1328 (W.D. Pa. 1977), dissolving preliminary injunction granted at 359 F. Supp. 1002 (W.D. Pa. 1973); *Cussler v. University of Maryland,* 430 F. Supp. 602 (D. Md. 1977); and *Peters v. Middlebury College,* 409 F. Supp. 857 (D. Vt. 1976). See also *Lewis v. Chicago State College,* 299 F. Supp. 1357 (N.D. Ill. 1969). In *Cussler,* the court stated:

> As the courts repeatedly have noted, promotion decisions in academia necessarily involve matters of professional judgment . . . The courts are, therefore, reluctant to substitute their judgment for the judgment of academics with expertise in their respective fields.

And, in *Johnson,* the same conclusion was reached:

> Plaintiff has pointed to no such case in the federal system in a proceeding under Title VII where the court has ordered a college professor to be promoted and be given tenure over the judgment of the professionals in academia. The principles above cited are recognized unanimously by all the courts, with the qualification of course "absent impermissible sex discrimination."

In each of these cases the district court, unable to find sufficient evidence of impermissible sex discrimination, ruled that the unfavorable employment decision at issue was motivated by legitimate and reasonable nondiscriminatory factors.

It is within the context of this considerable body of case law construing Title VII that the decision of the court below must be viewed. The court openly conceded that its approach was out of line with that of every other federal court that has ruled in a faculty case under Title VII:

> Of course, legislative sympathy for the plight of female college teachers does not alleviate Dr. Sweeney's obligation to prove herself the victim of sex discrimination in order to recover under Title VII. In fact, the difficulty of her task is underlined by the lack of cases in which plaintiffs have succeeded in similar challenges to sex discrimination in academia. Admittedly, most if not all of these female plaintiffs have lost. [citations omitted] ... Whether the evidence presented in these cases fell significantly short of the evidence in this case we do not know. However, we voice misgivings over one theme recurrent in those opinions: the notion that courts should keep "hands off" the salary, promotion, and hiring decisions of colleges and universities. 569 F. 2d at 175-176.

Amicus submits that it is not an accurate reading of the cases cited that courts should keep "hands off" faculty employment decisions. Rather, these cases stand for the proposition that, *in the absence of any evidence of impermissible sex discrimination*, a court should not substitute its judgment of an individual's qualifications or

performance for that of the appropriate experts in the faculty member's field of expertise. That point was clearly made in *Johnson v. University of Pittsburgh, supra,* where, after 74 days of trial, the court found insufficient evidence of discrimination and concluded (at 1371):

> This has been a long and exhausting piece of litigation posing many difficulties for the court as well as for counsel. The case has been thoroughly and exhaustively tried if not over tried by able counsel on both sides. The court is thoroughly appreciative of the important and serious issues involved in this case. On the one hand we have the important problem as to whether sex discrimination is operating to the detriment of women in the halls of academia. If so Congress has mandated that it must be eradicated. Colleges and universities must understand this and guide themselves accordingly. On the other hand we also have the important question as to whether the federal courts are to take over the matter of promotion and tenure for college professors when experts in the academic field agree that such should not occur.
>
> In determining qualifications in such circumstances the court is way beyond its field of expertise and in the absence of a clear carrying of the burden of proof by the plaintiff, we must leave such decisions to the PhDs in academia.

It can hardly be maintained that the court's attitude in *Johnson* was one of "hands off."

Judge Campbell of the First Circuit was sufficiently concerned about the tone of the court's opinion in this case to write a concurring opinion. He stated, "I agreed with the result, but the tone of the court's opinion leaves me uneasy. By emphasizing the 'importance' of the instant case and then dealing with such collateral questions as . . . the duty of courts not to defer unduly to universities' personnel policies, an impression is generated that this circuit may endorse the use of a sword rather than a scalpel in cases of this delicate nature." 569 F. 2d at 180.

Since the First Circuit's ruling in this case, the Second Circuit has had occasion to comment upon the effect of its decision in *Faro, supra*. In *Powell v. Syracuse University*, 17 EPD Para. 8468 (2d Cir. July 13, 1978), the defendant university was found to have had a legitimate nondiscriminatory reason for terminating the employment of a female faculty member. Notwithstanding the outcome of the case, the court cautioned against extension of *Faro* "beyond all reasonable limits":

> In recent years, many courts have cited the *Faro* opinion for the broad proposition that courts should exercise minimal scrutiny of college and university employment practices. Other courts, while not citing *Faro*, have concurred in its sentiments.
>
> This anti-interventionist policy has rendered colleges and universities virtually immune to charges of employment bias, at least when that bias is not expressed overtly. We fear, however, that the common-sense position we took in *Faro*, namely that courts must be ever-mindful of relative institutional competencies, has been pressed beyond all reasonable limits, and may be employed to undercut the explicit legislative intent of the Civil Rights Act of 1964. In affirming here, we do not rely on any such policy of self abnegation where colleges are concerned . . .
>
> It is our task, then, to steer a careful course between excessive intervention in the affairs of the university and the unwarranted tolerance of unlawful behavior. *Faro* does not, and was never intended to, indicate that academic freedom embraces the freedom to discriminate.

As in the present case, a concurring member of the three-judge panel was constrained to object to the majority's comments about the proper role of the courts in cases of this nature.

These two cases point up the confusion which now exists as to how the courts should handle sex discrimination cases involving academic institutions. The

resulting uncertainty within the higher education community would be dispelled if this Court were to grant a writ of certiorari in order to determine the scope of review in academic employment cases arising under Title VII.

B. *The court below failed to give weight to the well-established constitutional principle of restraint in cases involving academic evaluation.*

The decision of the court below in this case failed to take into account the numerous pronouncements of this Court over the years concerning the national interest in academic freedom. "Academic freedom" in the traditional sense has been defined[4] as follows:

> Academic freedom is the freedom of the teacher within his or her field of study. It is a safeguard that allows researchers and teachers in institutions of higher learning to pursue their work without the inhibition, prohibition, or direction of political, ecclesiastical, or other administrative authorities, regardless of their personal philosophies, behavior, or life-style. It is liberty granted to these individuals to assure them the opportunity for examination and challenge of doctrines, dogma, and received opinions in the interest of advancing knowledge for the benefit of all society.

Academic freedom has long been a major tenet of our American democratic faith. It, like other such tenets, is embedded in our constitutional law. Academic freedom has been construed to encompass a variety of elements: freedom to provide instruction in a foreign language (*Meyer v. Nebraska*, 262 U.S. 390 (1923)); freedom to express unpopular political beliefs in the classroom

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[4] "Academic Freedom," entry in Knowles, ed., *The International Encyclopedia of Higher Education* (San Francisco: Jossey-Bass, 1977), Vol. 2A, p. 24.

(*Sweezy v. New Hampshire*, 354 U.S. 234 (1957)); freedom to refuse to take a loyalty oath (*Keyishian v. Board of Regents*, 385 U.S. 589 (1966)); freedom to teach religiously unorthodox scientific theories (*Epperson v. Arkansas*, 393 U.S. 97 (1968); and freedom of students to organize an education-related extracurricular activity (*Healy v. James*, 408 U.S. 169 (1972)).

Academic freedom in its purest sense must be grounded in the freedom of academic institutions to fulfill their missions of teaching, research and service in an environment free of governmental interference with matters of educational policy. Justice Frankfurter acknowledged this necessity when he described "the four essential freedoms" of a university as "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire, supra,* at 263.

In its recently completed term, this Court decided two cases involving institutions of higher education which reaffirm the constitutional interest in academic freedom under the First Amendment and the due process clause of the Fourteenth Amendment. In *University of California Regents v. Bakke,* ____ U.S.____ (No. 76-811, decided June 28, 1978), Justice Powell, in finding that the attainment of a diverse student body is a constitutionally permissible goal under the equal protection clause, looked to the First Amendment's concern for academic freedom: "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." (slip op. at 42). Justice Powell also noted that a university must have wide discretion in making sensitive judgments as to who should be admitted. (slip op. at 45).

This Court's treatment of matters of academic judgment in *Board of Curators of the University of Missouri v. Horowitz,* ____ U.S. ____ (No. 76-695, decided March 1, 1978), is even more instructive in the present case. In *Horowitz,* a student in her final year of medical school at a state university was dismissed for failure to meet required academic standards with respect to clinical practice. She brought suit under the Civil Rights Act of 1871, 42 U.S.C. §1983, alleging that the school's failure to grant her a hearing prior to her dismissal violated her rights under the due process clause of the Fourteenth Amendment. In holding that a formal hearing was not required under the circumstances of the case, the Court distinguished between dismissals for disciplinary cause, *Goss v. Lopez,* 419 U.S. 565 (1975), and dismissals for academic cause:

> The decision to dismiss respondent, by comparison, rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking. (slip op. at 11).

In his concurring opinion, Justice Powell made a similar point: "University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation." (slip op. at n. 6).

Amicus submits that the same holds true *a fortiori* with regard to judgments concerning the academic performance of faculty members and their entitlement to promotion or tenure. Yet, the court below gave no weight to this constitutional interest in interpreting Title VII. A writ of certiorari should be issued in order for this Court to balance the well-established constitutional interest in academic freedom with an individual's right to be free of discrimination on the basis of sex. Such balancing would result in the fashioning of a uniform standard of judicial review for future faculty cases arising under Title VII.

C. *The public interest in the integrity of the nation's institutions of higher education requires that this Court determine the appropriate role of the judiciary in cases involving academic judgments.*

As the college-age population in this nation declines, and as the number of unemployed or underemployed Ph.D.'s increases, litigation over employment decisions at institutions of higher education can be expected to increase.[5] Monumental problems would be posed for colleges and universities if they had to defend lawsuits in which the entire peer review process had to be reconstructed in order for a court to arrive at its own judgment concerning an individual's qualifications. Even in cases in which the court is appropriately aware of the limitations of its expertise, the time and expense involved in trying a faculty case under Title VII can be enormous. Judge Knox made the following observations at the beginning of his decision in *Johnson v. University of Pittsburgh, supra,* at 1332:

[5] See Shulman, *Federal Laws: Nondiscrimination and Faculty Employment* (Washington: American Association for Higher Education, 1975), p. 22.

> The forecast as to the complex and protracted nature of the case although not a class action has been borne out by subsequent events. The case was tried nonjury before the court, plaintiff having waived her rights to jury trial with respect to causes of action for damages under the Civil Rights Acts 42 U.S.C. 1983 and 1985 (3). Trial on the merits occupied the court for a period of 74 days during seventeen weeks. 12,085 pages of testimony were taken, 73 witnesses were heard, some of them being on the stand for many days, and close to 1,000 exhibits were received in evidence. During the trial, the court has been required to make excursions through the very frontiers of human knowledge in the ever advancing field of biochemistry. The case is also an example of the devastating effects of sex discrimination cases of this kind against universities upon the work and calendars of the United States courts, and the commitments and time of trial counsel. Attempts to curtail the case proved fruitless in view of plaintiff's claim, for which there appeared to be a reasonable basis that because of sex discrimination males had been hired and promoted in her department who were less qualified than she was to receive promotion and tenure. This necessitated the examination of the professional credentials of numerous professors, a task for which the court like probably most federal judges was ill suited. The case of *Cussler v. University of Md.* 430 FS 602 (D. Md. April 14, 1977) is another illustration of the problems posed by a case of this kind.

Amicus believes that both higher education and the federal judiciary would benefit from a limited and well-defined role for the courts in faculty employment cases brought under Title VII. Congress' mandate of nondiscrimination under that statute can be carried out through an exhaustive search for evidence of disparate treatment without involving the judiciary in the assessment of applicants' or employees' relative qualifications. *Amicus* urges this Court to grant a writ of certiorari in No. 77-1792 in order to define the appropriate role of the judiciary in cases involving academic judgments.

Conclusion

For the foregoing reasons, *amicus curiae* respectfully requests that the petition for a writ of certiorari be granted.

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